EMPLOYERS' LIABILITY LAW AND THE INDIANA RAILROADS, 1880-1915

Heather Hutchinson

Submitted to the faculty of the University Graduate School
in partial fulfillment of the requirements for the degree
Master of Arts
in the Department of History,
Indiana University

May 2002

Accepted by the Graduate Faculty, Indiana University, in partial fulfillment of the requirements for the degree of Master of Arts.

Elizabeth Brand Monroe, Ph.D.

Master's Thesis
Committee

Robert G. Barrows, Ph.D.

Annie Gilbert Coleman, Ph.D.

ACKNOWLDEDGEMENTS

I would like to thank Elizabeth Brand Monroe for her tireless efforts in reviewing this work, even at its most primitive stages. Without her guidance and encouragement, I would not have completed this task. I would also like to express my appreciation for her assistance and support throughout my education. I would also like to express my appreciation to Robert G. Barrows and Annie Gilbert Coleman for their efforts and comments while serving on my thesis committee and throughout my education. Finally, I would like to thank my husband, Tom, for his support and understanding throughout this process.

TABLE OF CONTENTS

INTRODUCTION

Prior to the American Industrial Revolution, Indiana was a rural agricultural community. Most people were self-employed farmers or craftsmen who worked near their homes. Some people worked as laborers, hiring their services out to others, but they often worked directly for a farmer or craftsman. Large companies like we know today simply did not exist. If an individual was injured while performing his job duties, he relied on his family, friends, fraternal order and church for support until he could return to work. Because communities were small, injured employees knew their employers well and were perhaps family members or neighbors. Because of this immediacy, employers helped support their injured employees.

In the nineteenth century, Indiana, like most of the United States, underwent dramatic change. The Industrial Revolution, first occurring in England in the eighteenth century and transforming the United States in the nineteenth century, changed the way people lived and worked. Inventions like the railroad helped to industrialize Indiana. Workplace innovations introduced by the Industrial Revolution reorganized the means of production. Many workers took jobs in factories rather than small shops, worked for total strangers under the supervision of middle managers, and performed mechanized tasks and ran the new machinery. Pride in a finished product no longer was the driving force behind work; work now

revolved around how much product could be produced ("piece work") or how quickly natural resources and finished products could be transported.

With this change in work came an increase in accidents. Unlike their counterparts prior to the Industrial Revolution, industrial workers—many of them immigrants to America or migrants from farms—did not have the connections to ensure support. Because industrialists were mainly concerned with maximizing profit, and because immigration and urbanization provided a nearly inexhaustible workforce, employers had no incentive either to prevent workplace injury or to care for injured workers.

While the nature of work and the nature of an employee-employer relationship changed dramatically thanks to the Industrial Revolution, the law of employers' liability stagnated. Prior to the Industrial Revolution, community charity provided for injured workers who had no need for the courts. Once industrial accidents began to occur, injured employees looked to the legal system for answers, and judges turned to the only resource which existed, the common law.

The common law stated that employers were only liable for harms done to employees if the employer was negligent. Absent a showing of fault on the part of an employer, an employee could not recover. The common law also afforded employers three defenses to help overcome work-related personal injury claims:

the fellow-servant defense, contributory negligence defense, and assumption of risk defense.

Under the fellow-servant defense, employers could evade liability for injuries if they showed that another employee (a fellow servant) of the injured employee caused the accident. The injured employee could then bring an action against his fellow servant but, as both men were generally wage laborers with few resources, this strategy was usually fruitless. Employers could also claim innocence based on the contributory negligence defense. This defense worked to deny recovery to an employee if he was negligent in any aspect of the accident. The assumption of risk defense allowed employers to escape liability by showing that the injured employee either knew of or contemplated the risk of injury before accepting employment. Employers vigorously used these defenses to avoid the costs of industrial accidents.

Chapter 1 examines the secondary literature surrounding legal history in general and employers' liability specifically by investigating economic, social, and legal change. Historians and legal scholars alike agree that the employers' liability defenses and the negligence standard itself worked to transfer the cost of industrialization to the worker. Had judges held employers accountable from the beginning, entrepreneurs would have feared investing in industry because of potential liability. The legal system helped to finance industrialization by giving employers an advantage. This advantage made sense in a growing industrial

economy where progress depended largely upon who could produce the fastest or travel the furthest. In the nineteenth century capital gains from risky investments fed the economy.

Chapter 2 discusses the foundations of workplace liability. Employers' liability law, as it developed in the courts and was adopted from the common law, was used by judges to encourage economic growth nationally. Modifications to employers' liability laws were a reaction to the continued economic growth, the resulting dangerous workplace, and an increasing number of injuries. Workers' compensation represented the ultimate revision of employers' liability law because it created a no fault compensation system where employers could insure against the possibility of employee injury and budget for this cost.

However, prior to the passage of workers' compensation laws in the first few decades of the twentieth century, employers' liability law consisted primarily of case law. Thus, we must first look to court decisions to understand how and why workers' compensation developed. Chapter 3 analyzes all Indiana Supreme Court decisions where an employee sued a railroad company for personal injury and the railroad company alleged one or more of the three employers' liability defenses: fellow servant, contributory negligence, and assumption of risk. An examination of Indiana Supreme Court cases from 1880 through 1915 illustrates the problems confronted by injured workers--inconsistency of judgments and the sometimes indiscriminate application of the employers' defenses.

This study examines whether the Indiana Supreme Court responded adequately to the needs of injured workers and how the context of the changing economy and industry played into the Court's decisions. Ultimately the Court was unable to develop a strong body of case law to adjudicate workplace injury. The case law that developed alongside industry proved ineffective when confronted by the successes of industrialization.

While the courts grappled with the increased number of employee injuries and a growing caseload, a wave of progressivism swept the nation. Among other political reforms social reformers campaigned for shorter work days, the elimination of child labor, and safer workplaces. Scholars who study workers' compensation legislation in other states and countries have found that workers' compensation legislation happened much faster than other progressive reforms because of the diversity of groups supporting comprehensive changes. Most scholars find that workers and employers alike, along with insurance companies, legislatures, and unions supported workers' compensation.

Chapter 4 examines Indiana's struggle for a legislative solution, looking at early employers' liability acts, interest groups that supported comprehensive workers' compensation legislation, and the success of Indiana's 1915 Workmen's Compensation Act. Indiana legislators attempted to statutorily abrogate the common law employers' liability defenses before the turn of the century and continued until they passed comprehensive legislation. Like the Indiana Supreme

Court's case law, the legislature's attempts to heighten employer liability through the 1893 act and its subsequent modifications failed.

The Indiana General Assembly passed a comprehensive workers' compensation act in 1915 that finally addressed the concerns of both workers and employers and forever ended legal adjudication of workplace injury claims. The legislature had accomplished what the Indiana Supreme Court had not been able to, largely with the support of workers, insurance companies, and unions.

CHAPTER 1

REVIEW OF THE SECONDARY LITERATURE

This history of workers' compensation laws is intertwined with the histories of labor, jurisprudence, and the Progressive Era. Because of this overlap, the secondary literature needed to examine the development of workers' compensation laws (and the railroad industry) spans several disciplines. As many authors discussed in this review would likely agree, it is nearly impossible to separate economic, social, and legal change. Economists, legal scholars, historians, sociologists, (muckraking) journalists, and political scientists have all contributed to the pool of relevant sources.

This review moves from the general to the specific. First, the review examines the content of legal history. Second, I analyze the more detailed history of tort law, specifically how tort law developed and its foundations for liability. Third, the review considers labor history and how labor historians' attitudes shape their discussions of the formation of workers' compensation statutes. Fourth, I look at historians' interpretations of progressivism and welfare legislation to better understand the climate in which workers' compensation was born. Finally, this review investigates the literature on workers' compensation laws as well as specific state case studies.

Legal History

Legal historians appraise broad legal changes in conjunction with social, economic, and political ones. Compared to other areas of history, new legal history is relatively young.[1] It has only been within the last thirty years that this field has truly blossomed. Only a few general histories of American law exist, with *A History of American Law* by Lawrence M. Friedman, published in 1973, the earliest and best known.[2]

In one volume Friedman discusses substantive law, procedure, legal institutions, and judicial interpretation of law from the seventeenth century to the beginning of the twentieth century, with summary treatment beyond that period.[3] Friedman pays considerable attention to the adoption of English common law traditions that helped to shape American law. In broad terms, Friedman asserts

---

[1]The term "new legal history" refers to more recent works, published in the last thirty or so years, that examine law critically. The development of modern social science offered legal scholars and historians a new means of discussing the interaction between law and history. New legal history considers the development of laws while also analyzing social, political, and economic changes affecting the law, making legal history part of the general history rather than keeping legal history separate.

[2]Upon publishing this work, Friedman reaffirmed the need for a more extensive examination of legal history, stating in his preface, "There are dozens of articles and books about the Supreme Court, about great judges, great cases, about the legal profession, about this or that aspect of law. There are patches and pieces; but no fabric as a whole." Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), 9.

[3]Friedman acknowledges that his last chapter serves only to highlight the main themes of the twentieth century.

that law does not exist in a void and he believes changes and developments in the law parallel changes and developments in society. He states that "the strongest ingredient in American law, at any given time, is the present: current emotions, real economic interests, concrete political groups."[4]

In his discussion of torts, Friedman finds a connection between the Industrial Revolution, injuries, profits, and laws passed to regulate or free business from financial responsibility. Friedman connects most leading tort cases to the railroad industry, finding that railroad law and tort law evolved together.[5] For Friedman, the railroad is an example of a development in society that paralleled substantial changes in tort law. Friedman also offers an insightful glance at the development of workers' compensation laws. Like his treatment of American law in general, he finds that workers' compensation laws developed because business and government realized these laws efficiently allocated the cost of doing business.

However, in *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*, Morton J. Horwitz disagrees with Friedman's assertions.[6] Horwitz contends that "[t]he development of law cannot be understood independently of social context."[7] He examines what he calls the transition from

---

[4]Friedman, *History of American Law*, 14.

[5]Ibid., 410.

[6]Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992).

[7]Ibid., 2

"Classical Legal Thought" (explained as a late nineteenth-century, laissez-faire conservative view) to "Progressive Legal Thought" (explained as a liberal, pro-government involvement) generated by sweeping social and economic transformation. According to Horwitz, changes including rapid centralization of economic resources, urbanization, immigration, industrialization, and social struggle were the impetuses for transformations in the law.

Unlike Friedman, who sees workers' compensation laws as a positive change enriching the lives of workers, Horwitz understands workers' compensation laws as a conspiracy of big business at the expense of labor and consumers. Horwitz paints a picture of progressive reformers fighting against conservative legal thought. Law was one way to force society to change. Horwitz points to workers' compensation legislation as a dramatic exception to most pre-World War I progressive measures because it was not centered in the courts. Workers' compensation laws, according to Horwitz, sought to extract disputes from the judicial system and make liability for injury another cost of doing business that could be estimated, insured against, and included in the price paid by the public, benefiting big business. Horwitz ties this legal transformation to progressive social change, actually reaffirming Friedman's idea that law does not exist in a vacuum.

Like Friedman and Horwitz, Kermit L. Hall offers a concise treatment of American legal development in *The Magic Mirror: Law in American History.*[8] However, Friedman and Horwitz offer a history of American jurisprudence, while Hall analyzes the role law has played in American history. Specifically, Hall writes "to elucidate the interaction of law and society as revealed over time through the main lines of development in American legal culture."[9] Hall sees law as a "cultural artifact, a moral deposit of society," in other words, law is inevitably an expression of society, culture, economics, and politics.[10]

Hall understands legislative tort law as a means for the legislature to distribute the cost of accidents among interested parties. He argues that one way to reduce the cost to entrepreneurs and encourage economic growth was to limit the liability for railroad accidents. While the onus of financial responsibility for industrial ills was often placed on the worker during the Industrial Revolution, Hall finds that antebellum jurists began to seek more of a middle ground, placing some responsibility on the entrepreneurs. This move to the middle ground eventually led to the passage of workers' compensation laws by legislatures. Within this explanation, Hall sheds light on the legislative development of

---

[8]Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989).

[9]Ibid., vii.

[10]Ibid., 4.

workers' compensation laws as well as regulations of railroads, as he looks at Progressive-Era ideals and their legal implementations.

While Friedman and other authors find that changes in law reflect changes in society, there is another view. Some scholars conclude that law is autonomous, and transformations in society and the economy do not influence the growth of the law. For example, James Willard Hurst does not believe that changes in society and economics were solely responsible for shaping the law. In *Law and the Conditions of Freedom in the Nineteenth-Century United States,* Hurst maintains that nineteenth-century law created a legal order that promoted the release of individual creative energy, while also mobilizing community resources.[11] Hurst's work is important as one of the first general characterizations of American legal development. Contemporary sources all seem to pay homage, although some ever so slightly, to Hurst's effort.

While Hurst does not examine the progress of workers' compensation laws in detail, he offers insightful findings. By applying Hurst's theory to employer liability law, the reader could deduce that nineteenth-century law created a climate favorable to the release of energy, because laws offering employers shelter from liability allowed for the expansion of the railroads. The fellow-servant rule, along

---

[11]James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956).

with other legal theories, limited employer liability and allowed for the growth. Once this "release of energy" was complete, these rules were changed by courts.

History of Tort Law

As Friedman, Horwitz, Hall, and others demonstrate, along with the rise of industry in the late nineteenth century came an unprecedented rise in injuries and, consequently, tort law came of age. Tort law is broadly defined as the law governing civil harms or wrongs. This thesis examines torts committed by employers, specifically railroads, against their employees. An understanding of Oliver Wendell Holmes Jr., Guido Calabresi, and Richard A. Posner enriches the discussion and helps explain why progressive state courts and legislatures abandoned the negligence standard and adopted strict liability under workers' compensation laws. With the birth of modern tort law came the questioning of the justification for fault liability in cases of unintended harm. Two distinct views merit attention here.

In *The Common Law*, Oliver Wendell Holmes Jr., argued for an objective standard of due care, meaning that individual actions should be held to the standard of a reasonable person.[12] This view, known as the negligence standard, dominated late nineteenth century thought. Of course, in the late nineteenth

[12]Oliver Wendell Holmes Jr., "The Common Law," in *Perspectives on Tort Law*, 4th ed., ed. Robert L. Rabin (New York: Little, Brown and Company, 1995).

century, common law principles—such as the fellow-servant rule,[13] contributory negligence,[14] and assumption of the risk[15]—worked alongside the negligence principle to shield employers from liability for workplace injuries. While Holmes finds the basis for holding someone liable for unintended harm in morality, recent scholars disagree.

Led by Richard Posner, recent scholars suggest that the rationale for liability based on fault comes from economic justifications.[16] In *Economic Analysis of Law,* Posner articulated what some scholars term a new school of jurisprudence known as economic jurisprudence.[17] In "A Theory of Negligence,"

---

[13]The common law fellow-servant rule acts as a defense to a claim of negligence. This rule states that a master (i.e., employer) cannot be held liable for a harm done by one servant (i.e., employee) to another.

[14]If an employer could demonstrate that an employee contributed, even in the slightest, to his own injury, the common law principle of contributory negligence would keep the employer from being held liable, even if the employer was also negligent.

[15]At common law, the assumption of risk principle allowed employers to escape liability for workplace injures where they could show that an employee had accepted the risk that caused the harm. Oftentimes knowledge that a specific industry, like railroads, was dangerous worked to bar an injured employee's claim.

[16] Posner and law and economic scholars rely on Judge Learned Hand's formula In *United States v. Carroll Towing Co.* to prove that courts rely on considerations of economic efficiency when assigning fault. Judge Hand put the negligence calculus in mathematical terms: "[I]f the probability [of injury] be called *P*; the injury *L*; and the burden [of protection] *B*; liability depends upon whether *B* is less than *L* multiplied by *P*." *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Circ., 1947). This formula basically states that an actor should be held at fault only when the costs of avoiding the harm are less than the harm itself.

[17]Richard A. Posner, *Economic Analysis of Law* (Boston: Little, Brown & Co., 1992).

appearing in the *Journal of Legal Studies,* Posner argues that the judgment of liability ultimately depends upon a weighing of costs and benefits.[18] If the magnitude of a loss plus the probability that such loss will occur is more than the cost of avoiding the harm, that is negligence.

In *Economic Analysis of Law*, Posner examines the general relationship between judicial and legislative decisions on market economics generally. Posner also offers other economic explanations of tort law. In *The Economics of Justice*, he argues (similar to Hurst and Horwitz) that judges, when assigning liability (and ultimately fault), look at what maximizes the wealth of society and economic efficiency.[19] In *The Economic Structure of Tort Law,* Posner and William M. Landes suggest that tort law is best explained as judges trying to promote efficient resource allocation.[20] Guido Calabresi agrees. In *The Costs of Accidents: A Legal and Economic Analysis*, Calabresi argues that the law of accidents is a means for courts to mandate behavior and resource allocation.[21] He views judges and legislators as important independent actors in assigning fault to best serve economic needs.

---

[18]Richard A. Posner, "A Theory of Negligence," *Journal of Legal Studies* 1 (January 1972): 29-48.

[19]Richard A. Posner, *The Economics of Justice* (Cambridge, Mass.: Harvard University Press, 1981).

[20]William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (Cambridge, Mass.: Harvard University Press, 1987).

[21]Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven, Conn.: Yale University Press, 1970).

The intellectual foundations of tort law or the rationale for the development of the tort system may seem only tenuously connected to the formation of workers' compensation, but both offer explanations of liability based on fault. Although the differences between Holmes and Posner may seem unimportant when examining the end result of court cases or the passage of workers' compensation legislation in Indiana, their views have certainly influenced secondary literature. Moreover, depending on the views of those adjudicating disputes, whether the fault principle is based on a moral or economic justification can affect the outcome of cases and possibly the passage of legislation.

Aside from understanding the ideological roots of negligence and liability, understanding the history of the tort system is also important. In order to appreciate the broad changes workers' compensation legislation brought, we must examine negligence law in more depth. Most general histories of the law, including Friedman's and Horwitz's works, as well as brief treatments in many of the journals consulted, offer concise treatments of the history of torts.

The most thorough monograph on the history of tort law is G. Edward White's *Tort Law in America: An Intellectual History*.[22] He shows that before the nineteenth century, torts were not a distinct area of the law such as property or crime. Because tort law was a relatively young field, White provides a thorough

---

[22]G. Edward White, *Tort Law in America: An Intellectual History* (New York: Oxford University Press, 1980).

examination of the history of the commentary on torts. He also discusses the academics and judges who helped to shape tort law. White disagrees with legal scholars who argue that American judges adopted the negligence principle because they feared that the alternative—strict liability—would discourage risk-taking entrepreneurial activity and slow down progress. White maintains that academic and intellectual attitudes of the late nineteenth century shaped tort law. White draws from Robert Wiebe's argument in *The Search for Order, 1877-1920*, contending that by the late nineteenth century intellectuals were trying to restore the order that characterized eighteenth-century thought.[23] White finds that the tort system was organized to build a simple and comprehensive system which would offer order.

Three authors complement White's history of tort law. Both Leonard W. Levy, in *The Law of the Commonwealth and Chief Justice Shaw*, and Charles O. Gregory, in "Trespass to Negligence to Absolute Liability," examine the foundations of modern tort law.[24] Levy looks at influential Massachusetts appellate judge Lemuel Shaw during an important period in American legal history, 1830 to 1860. Levy maintains that Shaw's contributions to the law of

---

[23]Robert Wiebe, *The Search for Order, 1877-1920* (New York: Hill & Wang, 1976).

[24]Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge, Mass.: Harvard University Press, 1957); Charles O. Gregory, "Trespass to Negligence to Absolute Liability," *Virginia Law Review* 37 (1951): 359-370.

common carriers (railroads), the fellow-servant rule, and the law of negligence cannot be underestimated. Despite Levy's focus on a period prior to that examined in this thesis, Shaw's contributions to jurisprudence help explain the rationale for nineteenth-century tort law.

In "Trespass to Negligence to Absolute Liability," Charles O. Gregory traces the forms of civil liability from their foundation in English common law through the industrial era. Like Levy, Gregory credits Chief Justice Shaw with laying the foundations for a consistent theory of liability for unintentional harm.

While Gregory and Levy examine the early foundations of tort law, Robert L. Rabin concentrates on the period from the Civil War to World War I in "The Historical Development of the Fault Principle: A Reinterpretation" and "Some Reflections on the Process of Tort Reform."[25] In the first article, Rabin examines several noteworthy cases from this period and finds that liability based on fault was not pervasive as many historians argue. Rabin maintains that during this period neither Holmes' nor Posner's explanation of the fault principle works: he finds that the fault system was much more complicated. He states that "[t]he great failure" of tort historians is their "tendency to ignore [the] fundamental

---

[25]Robert L. Rabin, "The Historical Development of the Fault Principle: A Reinterpretation," *Georgia Law Review* 15 (1981): 925-963; Robert L. Rabin, "Some Reflections on the Process of Tort Reform," *San Diego Law Review* 25 (1988): 13-23.

distinction" between negligence in terms of the violation of a duty and the legal elements of negligence: duty, cause-in-fact, proximate cause, and damages.[26]

In a second article, "Some Reflections on the Process of Tort Reform," Rabin argues that dissatisfaction with accident law was tied directly to the rise of the railroad. Rabin finds this "engine of destruction" a serious risk to the labor force. As more and more injury cases came before the courts, judges accepted the defendant's reliance on a trinity of defenses--contributory negligence, assumption of the risk, and the fellow-servant rule. Rabin points to a second major change in tort law with the Progressive Era tenet of workplace reform. He argues that states became social welfare laboratories with tort reform, which first manifested as workers' compensation legislation.

Labor History

Labor historians traditionally look at the interaction between labor, management, the economy, and the law. In *The Visible Hand: The Managerial Revolution in American Business*, Alfred D. Chandler argues that between 1850 and 1920 the visible hand of management replaced the invisible hand of market forces thereby controlling the economy and allocating resources during the

[26]Rabin, "The Historical Development of the Fault Principle, 929.

formative years of modern capitalism.[27] According to Chandler, the techniques used by modern managers (the visible hand) began with the railroads. Chandler points to new technology, an expanded market, increased production, and mass distribution, as well as modern business enterprise, as the dominant influences during the second half of the nineteenth century. Chandler does not see general public policy, or Progressive Era policy, as the driving force. He maintains that the strategies adopted by the railroads show the visible hand working to maximize profit and minimize liability.

In *Belated Feudalism: Labor, the Law, and Liberal Development in the United States,* Karen Orren offers a history of labor-employer relations and their impact on the development of liberalism.[28] Orren follows the thinking of Friedman and Horwitz, arguing that courts took an active role in shaping policies that facilitated the social and economic needs of society. Orren also agrees with scholars like Christopher L. Tomlins when she argues that lawmakers and judges selected laws, especially labor laws, that placed the burden of labor costs on workers rather than industrialists. Concentrating on labor relations and the railroads, she finds that during the height of industrialization, railroads were the

---

[27]Alfred D. Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, Mass.: Harvard University Press, 1977).

[28]Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (New York: Cambridge University Press, 1991).

beneficiaries of policies that allowed them to flourish without the burden of strict liability laws.

Tomlins in *Law, Labor, and Ideology in the Early American Republic,* looks at the role of government, particularly the courts, and antebellum labor history.[29] Tomlins finds that courts endorsed theories and legislative rules supporting employer immunity. Tracing Indiana's adoption of the fellow-servant rule and the exceptions that were eventually carved out for employer liability, Tomlins argues that "judges and treatise writers who were engaged in the resolution of disputes and the description of legal relationships were of necessity allocating power, authority, and responsibilities."[30] Their actions endorsed a relationship between labor and capital that placed the burden of progress and industrialization on the workers. According to Tomlins "[p]eople at work were not citizens but servants."[31]

---

[29]Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993).

[30]Ibid., xiv. Tomlins looks specifically at how state courts in Indiana and other midwestern states underwrote employer immunity during the 1850s and 1860s. He explains that Indiana adopted a "different-department" exception tempering employers' immunity to employee lawsuits. However, in less than ten years, the courts slowly diluted this exception and continued to find employers impervious to most negligence claims.

[31]Ibid., 384.

Progressivism and Welfare Legislation

In the late nineteenth and early twentieth centuries, reformers sought to solve problems like overcrowding, industrialization, disease, hazardous workplaces, and poor living conditions for many children. Progressive-Era reformers wanted to improve the health and safety of industrial workers, and campaigned for greater employee benefits and compensation for accidents by the employers. Progressivism was fundamentally a social and political movement, not a legal one.

Several scholars address the interaction between politics, society, and economy in the Progressive Era. In *Creating the Welfare State: The Political Economy of Twentieth-Century Reform*, Edward Berkowitz and Kim McQuaid argue that the American welfare state, which would include workers' compensation laws, was created by big business to develop the type of workplace that would best serve its needs.[32] They ultimately conclude that capital accepted and encouraged the development of a moderate welfare state in part to avoid a true welfare state.

[32]Edward Berkowitz and Kim McQuaid, *Creating the Welfare State: The Political Economy of Twentieth-Century Reform* (New York: Praeger, 1988).

Melvin I. Urofsky examines state reactions to welfare legislation in "State Courts and Protective Legislation During the Progressive Era: A Reevaluation."[33] Urofsky maintains that Progressive-Era cases have been mischaracterized as too conservative by historians Gilbert Roe and Roscoe Pound when in reality courts reflected moderate reformist views. He states that "'[t]he Progressives, for all their complaints, could really have asked for no more."[34] Urofsky examines Progressive-Era cases dealing with child labor, maximum hours, minimum wages, and employer liability, to find that state courts supported these reforms. In his examination of workmens' compensation laws, Urofsky finds that a rather rapid spread of legislation was accepted by most state courts. Furthermore, Urofsky reasons that state courts are often mischaracterized as conservative because state legislatures passed only limited employers' liability laws, and state courts did not uphold them uniformly for a variety of reasons. A few decisions rejecting compensation legislation received a lot of attention, some laws lacked effective enforcement mechanisms, and some state courts' memberships' resembled the United States Supreme Court, which was in the midst of a long period of conservative domination until the end of the Progressive Era.

---

[33]Melvin I. Urofsky, "State Courts and Protective Legislation During the Progressive Era: A Reevaluation," *Journal of American History* 74 (June 1985): 63-91.

[34]Ibid., 91.

Workers' Compensation Studies

Most workers' compensation scholars argue that the laws created by state legislatures and interpreted by state courts, more often than not, resulted from employers and employees working together. To prove this contention, workers' compensation scholars (including historians, sociologists, economists, and political scientists) examine the period prior to the enactment of workers' compensation laws along with the reasons for the enactment of such laws.

One of the best concise treatments of the development and implementation of workers' compensation laws is "Social Change and the Law of Industrial Accidents" by Lawrence M. Friedman and Jack Ladinsky.[35] The authors analyze the evolution of employer liability law from the common law tort system to the establishment of workers' compensation laws. They take a historical approach, examining the formation of the fellow-servant rule, the application of the rule, the weakening of the rule, the rising pressure for change, and the final step to the workers' compensation system. Ladinsky and Friedman apply Friedman's basic premise in *A History of American Law*, arguing that social change and legal change are tied together. As Progressive-Era reformers pushed to hold employers liable for workplace accidents, and as courts began to carve out exceptions to the

[35]Lawrence M. Friedman and Jack Ladinsky, "Social Change and the Law of Industrial Accidents" in *American Law and the Constitutional Order,* ed. Lawrence M. Friedman and Harry N. Scheiber (Cambridge, Mass.: Harvard University Press, 1978).

fellow-servant rule, employer immunity was eventually replaced by the workers' compensation regime, a rational actuarial system that balanced the current interests of labor and management.

In "State Timing of Policy Adoption: Workmen's Compensation in the United States, 1909-1929," sociologist Eliza Pavalko examines factors contributing to the passage of workers' compensation laws in the states.[36] She finds that states were quicker to adopt compensation legislation when both work-accident litigation and productivity were high. Data from individual states demonstrates the strength of laws and the speed of their passage. She concludes that labor activity, the success of lawsuits filed by injured workers, and the strength of capital, affected the passage of workers' compensation laws in the states. By analyzing the number of state supreme court cases decided in favor of workers, Pavalko also looks at how court cases affected the timing of adoption of workers' compensation laws. Pavalko finds that states adopted legislation faster when there were more court cases, regardless of who was victorious in court.

Labor historians have also examined workers' compensation, generally finding that business leaders supported the passage of workers' compensation law

---

[36]Eliza Pavalko, "State Timing of Policy Adoption: Workmen's Compensation in the United States, 1909-1929," *American Journal of Sociology* 95(November 1989): 593-615.

because, more often than not, such laws passed the cost of accidents on to employees. In "Workmen's Compensation and the Prerogatives of Voluntarism," Roy Lubove argues that workers' compensation laws really were programs to meet the needs of private business groups as much as the needs of injured workers.[37] Lubove also maintains that even after the passage of workers' compensation legislation, workers continued to bear most of the cost of injuries in the form of low benefit schedules, waiting periods, skimpy medical coverage, and the exclusion of occupational diseases.

James Weinstein agrees with Lubove's findings in "Big Business and the Origins of Workmen's Compensation."[38] Weinstein chronicles the role big business played in the development and eventual codification of workers' compensation laws. He concludes that the eventual adoption of workers' compensation legislation was largely due to an understanding on the part of big business that passage of such legislation would strengthen business.

Like Lubove and Weinstein, Daniel M. Berman in *Death on the Job: Occupational Health and Safety Struggles in the United States* argues that business controlled the move for workers' compensation legislation and other work safety related programs because it could then emphasize compensation over prevention of

---

[37]Roy Lubove, "Workmen's Compensation and the Prerogatives of Voluntarism," *Labor History* 8 (Fall 1967): 254-279.

[38]James Weinstein, "Big Business and the Origins of Workmen's Compensation," *Labor History* 8 (Spring 1967): 156-174.

accidents and maximize profits.[39] Berman chronicles business organizations which saw the changing legal tide in the Progressive Era and responded by taking control of workers' compensation initiatives to ensure that radical legislation did not pass. Berman also looks at labor's initial hesitance to join the workers' compensation movement because big business interests controlled the movement.

Harry Weiss's chapter "Employers' Liability and Workmen's Compensation," in *History of Labour in the United States, 1896-1932,* examines the formation and implementation of workers' compensation laws.[40] Weiss describes legislation passed prior to workers' compensation that also made employers liable for workers' injuries. He explains the importance of state commissions and investigative bodies in establishing and administering workers' compensation laws. Weiss characterizes workers' compensation as too conservative and concludes that while workers' compensation laws were a step forward, their administration and exclusionary provisions were too restrictive.

Progressivism brought changes in workers' compensation on the federal level as well. The railroads were a particular target of federal reformers because of

---

[39]Daniel M. Berman, *Death on the Job: Occupational Health and Safety Struggles in the United States* (New York: Monthly Review Press, 1978).

[40] Harry Weiss, "Employers' Liability and Workmen's Compensation," in John Rogers Commons et al., eds., *History of Labour in the United States* (New York: A.M. Kelley, 1966 [1935].

the dangers they posed to railroad workers. In "Workmen's Compensation on Interstate Railways," first published in 1934 and undoubtedly affected by New Deal thought, Lester P. Schoene and Frank Watson look at the effects of the federal Employer's Liability Act of 1906, its overlap with similar state provisions, and what types of injuries and occurrences it covered.[41] They find that the added costs associated with recovering under the Act discouraged the assertion of the right itself. The authors found that the result of the Act was certainly not the original legislative intent, which was to provide for injured railroad employees.[42] Schoene and Watson present a call for uniform change and increased liability.

By far, the leaders and most prolific writers in this field are Shawn Everett Kantor and Price V. Fishback, both economics professors at the University of Arizona. Aside from articles dealing with the historical, sociological, and political effects of workers' compensation laws, several of their articles focus specifically on the economic impact of workers' compensation. While these articles often offer mathematical calculations and data to support their findings, they also use this data to draw historical conclusions that are important when considering why courts abandoned the fellow-servant rule, as well as other legal doctrines limiting

---

[41]Lester Schoene and Frank Watson, "Workmen's Compensation on Interstate Railways," *Harvard Law Review* 47 (January 1934): 389-424.

[42]Schoene and Watson state that "any system which has inherent in it the possibility of making recovery depend upon the generosity of the employer can scarcely be an effective safeguard for the interests of the worker." Ibid., 409.

employer liability, and adopted a system placing the cost of workplace injuries on employers.

The most germane article from Kantor and Fishback is "The Adoption of Workers' Compensation in the United States, 1900-1930."[43] The authors maintain that while workers certainly benefited from the passage of workers' compensation laws, employers and insurance companies actually pushed for the legislation. The authors provide a more thorough examination than some, as they discuss insurance companies extensively. Kantor and Fishback propose that workers, business owners, insurance companies, and labor unions supported workers' compensation laws, which succeeded while most other social welfare programs of the Progressive Era failed. The authors also analyze empirical data to determine the factors that contributed to the adoption of workers' compensation laws and conclude that social reformers played a much smaller role than most scholars believe.

In "Nonfatal Accident Compensation and the Common Law at the Turn of the Century," Kantor and Fishback, with data (including court decisions) compiled by the Michigan Bureau of Labor and Industrial Statistics, investigate the employer liability system from 1896 to 1903, to paint a picture of the impact of the common

---

[43]Shawn Everett Kantor and Price V. Fishback, "The Adoption of Workers' Compensation in the United States, 1900-1930," *Journal of Law & Economics* 61 (October 1998): 305-335.

law before the passage of workers' compensation laws.[44] They find that the efficacy of common law defenses of contributory negligence, assumption of the risk, and the fellow-servant rule, along with legal costs, made injured workers less likely to file lawsuits because of the uncertainty of recovery. They show that these legal doctrines allowed employers to avoid liability, presenting a strong case for the necessity of workers' compensation legislation.

In another article by Kantor and Fishback, "Did Workers Pay for the Passage of Workers' Compensation Laws?" the authors examine the effect of workers' compensation laws between 1907 and 1923 on the real wages of employees in three industries: coal mining, lumber milling, and the unionized business trades.[45] The authors look at wages and benefits before and after the passage of workers' compensation laws to find that wages fell as benefits rose. Kantor and Fishback provide a table of compensation averages using data from several sources, as well as a table of expected benefits under each state's workers' compensation legislation characterized as a percentage of annual earnings from 1910 and 1923. Kantor and Fishback conclude, as have many authors looking at workers' compensation, that employers led the way in supporting legislation. They

---

[44]Shawn Everett Kantor and Price V. Fishback, "Nonfatal Accident Compensation and the Common Law at the Turn of the Century," *Journal of Law, Economics & Organization* 11 (April 1995): 406-433.

[45]Shawn Everett Kantor and Price V. Fishback, "Did Workers Pay for the Passage of Workers' Compensation Laws?," *Quarterly Journal of Economics* 110 (August 1995): 713-742.

also demonstrate empirically that employers likely supported the legislation because they passed a substantial portion of the cost on to workers in the form of lower wages. In other words, Kantor and Fishback conclude that the workers themselves paid for compensation laws because employers took the cost of the insurance premiums from the workers' wages rather than from company profits.

In "Precautionary Savings, Insurance, and the Origins of Worker's Compensation," Kantor and Fishback examine the effect of workers' compensation laws on individual savings and insurance.[46] The authors look at the results of a 1917-1919 survey of industrial workers to determine if employees self-insured against accident risk by either purchasing individual insurance or placing money in savings. Kantor and Fishback conclude that workers, after the passage of workers' compensation laws, reduced their own savings and the amount of insurance coverage they obtained because they could rely on benefits provided by workers' compensation.

Kantor and Fishback also offer a look at the state's involvement in underwriting workers' compensation insurance. Depending on each state's statute, insurance could be provided by the state or by private insurance companies. In "The Durable Experiment: State Insurance of Workers' Compensation Risk in the

---

[46]Shawn Everett Kantor and Price V. Fishback, "Precautionary Savings, Insurance, and the Origins of Worker's Compensation," *Journal of Political Economy* 104 (April 1996): 419-442.

Early Twentieth Century," the authors present quantitative and case-study analysis of state choices between public and private insurance.[47] In Washington, Ohio, and Minnesota they maintain that opposition from insurance companies and farmers pushed most state legislatures to adopt private insurance despite pleas from labor unions.

In "Square Deal or Raw Deal? Market Compensation for Workplace Disamenities, 1884-1903," Kantor and Fishback look at male data on workers from Kansas, Maine, and California, female workers in Indianapolis and child laborers in New Jersey.[48] For each group, the authors compiled compensating differentials (disamenities) for unemployment risk, accident risk, and occupational illness to test whether Progressive Era reformers were correct in their assertions that workers' compensation legislation was needed. Kantor and Fishback prove through these mathematical computations that before the passage of workers' compensation laws, accident risk was partially compensated, and occupational

---

[47]Shawn Everett Kantor and Price V. Fishback, "The Durable Experiment: State Insurance of Workers' Compensation Risk in the Early Twentieth Century," *Journal of Economic History* 56 (December 1996): 809-836.

[48]Shawn Everett Kantor and Price V. Fishback, "Square Deal or Raw Deal? Market Compensation for Workplace Disamenities, 1884-1903," *Journal of Economic History* 52 (December 1992): 826-848. Kantor and Fishback obtained their data from the Historical Labor Statistics Project at the University of California that evaluated many state labor reports. They looked specifically at women in Indianapolis in 1892 and found that they were not paid any more based on the danger of their job. However, these data are not used for this paper as there were no female railroad workers who were injured and sued their employer (with either party appealing to the Indiana Supreme Court) between 1880 and 1920.

illness was never compensated. In sum, the authors used these data to prove the need for workers' compensation laws during the Progressive Era.

Finally, in the only book published by Kantor and Fishback, *A Prelude to the Welfare State: The Origins of Workers' Compensation*, the authors utilize the data collected for their many journal articles to draw broad conclusions about the development of workers' compensation laws.[49] They point to the widespread importance of workers' compensation legislation and argue that workers' compensation set the precedent for other social welfare programs, including unemployment insurance, Social Security, and Medicare. They also claim that workers' compensation laws helped set the stage for the acceptance of no-fault liability rules for auto accidents and strict liability for product flaws. In *A Prelude to the Welfare State*, the authors also "use a blend of quantitative and qualitative studies to develop a comprehensive interpretation of the origins of workers' compensation."[50] Lastly, they use the data to prove that, while workers, employers, and insurance companies disputed the details of workers' compensation, in general they all supported the legislation.

Price Fishback also teamed with Seung-Wook Kim, an economics professor at Chung-Ang University in Korea, to again examine compensating differentials

---

[49]Shawn Everett Kantor and Price V. Fishback, *A Prelude to the Welfare State: The Origins of Workers' Compensation* (Chicago: University of Chicago Press, 2000).

[50]Ibid., 4.

with railroad employees. In "Institutional Change, Compensating Differentials, and Accident Risk in American Railroading, 1892-1945," Fishback and Kim look at the effect of federal, rather than state, laws on the compensating differentials.[51] They found that compensation rose as unions and government became more interested in the post-accident compensation of injured workers. Fishback and Kim's data are important because they show that workers' compensation laws specifically led to improvements for railroad workers. The authors also provide empirical data on railroad workers' benefits during both World War I and World War II.

In those states that have been examined in detail, scholars find that workers' compensation legislation was largely a result of cooperation between business and labor. In "Conflict and Compromise: The Workmen's Compensation Movement in New York, 1890s–1913," Robert F. Wesser, an economist, offers a political history of the successes and failures of workers' compensation legislation in New York, a state chosen because it "provides a good illustration of this pattern of conflict, interaction, and compromise."[52] Wesser emphasizes the role of business support of workers' compensation, finding that business was interested in

---

[51]Seung-Wook Kim and Price V. Fishback, "Institutional Change, Compensating Differentials, and Accident Risk in American Railroading, 1892-1945," *Journal of Economic History* 53 (December 1993): 796-823.

[52]Robert F. Wesser, "Conflict and Compromise: The Workmen's Compensation Movement in New York, 1890s-1913," *Labor History* 12 (Summer 1971): 341-372, 348.

legislation because it heightened the predictability of costs of lawsuits by injured employees, promoted harmony with organized labor and encouraged conservative unionism. Wesser also examines the role of organized labor in the passage of the New York legislation.

Economists Shawn Everett Kantor and Price V. Fishback examine Missouri's experience with workers' compensation in "Coalition Formation and the Adoption of Workers' Compensation: The Case of Missouri, 1911 to 1926."[53] These authors, like Wesser, point to the element of compromise between workers and employers. They argue that employers, labor union representatives, and the Missouri bar all exercised considerable influence over the adoption of workers' compensation legislation. Kantor and Fishback's research is largely quantitative, but they provide an excellent chart comparing the year of enactment, ratio of benefits to annual earnings, type of compensating insurance scheme, and the method of administration in all fifty states.[54] While Wesser, Kantor, and Fishback look at the economic effects of workers' compensation to show how coalitions of

---

[53]Shawn Everett Kantor and Price V. Fishback, "Coalition Formation and the Adoption of Workers' Compensation: The Case of Missouri, 1911 to 1926" in Claudia Goldin and Gary D. Libecap, eds., *The Regulated Economy: A Historical Approach to Political Economy* (Chicago: University of Chicago Press, 1994): 259-297.

[54]Ibid., 261-62. Kantor and Fishback calculate that Indiana, when compared with other states, had a low ratio of benefits to annual earnings (offered less compensation to injured workers). However, this study is based on all industries, not just railroads.

interests aided its passage, labor historians come to similar conclusions. In "An Instance of Labor and Business Cooperation: Workmen's Compensation in Washington State," Joseph Tripp finds that this legislation resulted from the cooperation between organized labor and employers, mostly lumber employers who could no longer control legal judgments, as most common law defenses were unraveling.[55] At the same time judgments, insurance, and litigation costs were rising. Tripp uses Washington court cases, labor organization records, and the personal papers of lumber company executives to show this cooperation.

Robert Asher examines New York State in "Failure and Fulfillment: Agitation for Employers' Liability Legislation and the Origins of Workmen's Compensation in New York State, 1876-1910."[56] Asher also finds that business and labor cooperated to pass compensation legislation, but unlike Wesser, Kantor and Fishback, and Tripp, he finds that labor leaders did more than any other group to secure the passage of workers' compensation legislation. Asher argues that labor brought the issue of liability to the voter, and in close elections, legislators gained their support by voting for reform bills. He identifies the sympathy and support of the middle class reformers for the plight of the industrial worker. He

---

[55]Joseph Tripp, "An Instance of Labor and Business Cooperation: Workmen's Compensation in Washington State," *Labor History* 17 (Fall 1976): 530-550.

[56]Robert Asher, "Failure and Fulfillment: Agitation for Employers' Liability Legislation and the Origins of Workmen's Compensation in New York State, 1876-1910," *Labor History* 24 (Spring 1983): 198-222.

finds that the expansion of legal liability made the controlled costs of workers' compensation insurance more attractive to employers.

Joseph Castrovinci looks at the passage of workers' compensation in Illinois. In "Prelude to Welfare Capitalism: The Role of Business in the Enactment of Workmen's Compensation Legislation in Illinois, 1905-12," Castrovinci, like Asher, finds that as courts began to pull away from the established common law and increasingly found for workers suing employers, business began to favor the passage of workers' compensation laws.[57] Castrovinci's study is broader than Asher's, as it examines the state commission established to study workers' compensation laws and the involvement of business interests in Illinois's commission. Like other scholars who examined state workers' compensation laws, Castrovinci also looks at labor's role.

The general histories of law or tort law explain the development of the common law that governed workplace liability as well as the birth of the common law employers' liability defenses (fellow-servant, assumption of risk, and contributory negligence). These sources also discuss the transition and the rationale for the development of comprehensive workers' compensation legislation. The labor histories also explain the transition in the economy

---

[57]Joseph Castrovinci, "Prelude to Welfare Capitalism: The Role of Business in the Enactment of Workmen's Compensation Legislation in Illinois, 905-12," *Social Service Review* 50 (March 1976): 80-102.

(specifically industrialization) that facilitated legal change. More specific sources offer detailed case or industry studies. While none of these sources focus on Indiana, they show what factors influenced courts and legislatures in general. Usually, these studies deal with larger, more influential industrial states such as New York, while others center upon states like Washington or California that were on the cutting edge of some Progressive-Era reforms.

This thesis tests some of those theories. Historians like Friedman and Hall contend that law and society are intertwined. Tomlins supports them, finding that lawmakers and judges selected laws, especially labor laws, that placed the burden of labor costs on workers rather than industrialists. Legal scholars like Posner argue that judges based tort rulings on resource allocation. This thesis examines Indiana Supreme Court cases that considered workplace liability in the railroad industry to test if the common law defenses (fellow-servant, assumption of risk, and contributory negligence) denied injured employees recovery and helped lead to the passage of workers' compensation in Indiana.

CHAPTER 2

A BRIEF HISTORY OF EMPLOYERS' LIABILITY LAW

After the Civil War the United States industrialized at a rapid pace. Industrialization also initiated change in the law. In the law of industrial accidents the common-law negligence standard governing workers' liability was transformed into a workers' compensation system, where employers compensated injured employees regardless of who was at fault. Between 1900 and 1920, the federal government and forty-three states enacted workmens' compensation laws.[58] Rarely in American history has legislation been so powerful and accepted so quickly and completely. This chapter discusses the turn-of-the-century legal environment, the Industrial Revolution, and the railroad. It also sets the context for Indiana's experience, which will be analyzed in Chapters 3 and 4.

Understanding the origins of employers' liability laws is the first step in analyzing them. Tort law (the law of civil wrongs or harms), the law that governed workplace liability, did not develop until the nineteenth century.[59] There was little

---

[58]Shawn Everett Kantor and Price V. Fishback, "Coalition Formation and the Adoption of Workers' Compensation: The Case of Missouri, 1911 to 1926" in Claudia Goldin and Gary D. Libecap, eds., *The Regulated Economy: A Historical Approach to Political Economy* (Chicago: University of Chicago Press, 1994), 261-63.

[59]Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989), 47.

reason in the colonial and early national periods for employers' liability laws to develop, since only a small portion of the pre-industrial labor force was categorized as "employees."[60] Richard A. Posner explains pre-negligence liability prior to the nineteenth century, finding that employers were held liable for harms caused by their accidents whether or not they were at fault.[61] Industrialization brought about significant and rapid changes in manufacturing techniques, which necessitated change in the law of workplace liability and the abandonment of the no-fault standard of liability.

Industrialization was a gradual process, happening in phases.[62] The first phase of the Industrial Revolution began in England by the middle of the eighteenth century. Invention of the steam engine brought steam power into the industrial setting as well as for transportation; innovative textile machinery such as the spinning jenny and the mule revolutionized the manufacture of cloth. England's economy was transformed from agriculture to industry as productivity

---

[60]In 1800, 10 percent of the white labor force was characterized as employees; by 1860 the number was only 20 percent. Slaves were not included in these numbers as they were governed by a separate body of laws. Ibid., 112.

[61]Richard A. Posner, "A Theory of Negligence," in Robert L. Rabin, *Perspectives on Tort Law*, 4th ed. (Boston: Little, Brown & Company, 1995), 15.

[62]The material for the following eight pages is largely drawn from discussions of the Industrial Revolution in Walter Licht, *Industrializing America: The Nineteenth Century* (Baltimore: Johns Hopkins University Press, 1995); George Brown Tindall and David Emory Shi, *America: A Narrative History,* 4th ed. (New York: W.W. Norton & Co., 1997); and Alan Trachtenberg, *The Incorporation of America: Culture and Society in the Gilded Age* (New York: Hill and Wang, 1982).

and technical efficiency powered by the new inventions led to risk taking, investment, new business ventures, and an increase in material goods. These inventions, once they made their way to the States, brought about the same drastic changes in this country.

A second wave of industrialization hit the United States in the late nineteenth century, bringing more technical and organizational advances. The technological inventions that marked the first phase of the Industrial Revolution fulfilled their promise and changed the way that goods and services were produced.

This second wave of the Industrial Revolution happened more in the United States than in England. In the United States, all the elements necessary for rapid industrialization were present: abundant natural resources, a government eager to promote growth, ambitious entrepreneurs, a corporate form, and technology. A labor surplus was also available, which provided the workers needed to run these new machines. In addition, the United States experienced both native population growth and immigration during the industrial period.[63] Accompanying this

[63]Population growth accompanied industrialization. Between 1860 and 1900 the population more than doubled and, more importantly, the industrial labor force nearly tripled between 1880 and 1910. As population and the labor force increased, the pool of potential employees became larger and employees disabled by workplace accidents were quickly replaced. This growing population allowed industrial employers to treat workers as an unlimited commodity; when one was injured or incapacitated, another waited to take his place.

population explosion was urban growth.[64] As people moved to the factories, old cities grew and new ones developed.

Just as important as technological advances and population growth was the changing structure of business. Beginning with the large railroad companies, entrepreneurs learned how to organize large work forces, tasks, and capital. Engineers looked for the most efficient means to organize factories and control production. Once they coupled their new techniques with the new technology, they reduced their labor costs and reinvested their profits--which led to more growth.

The Industrial Revolution also brought transformations to the workplace, as the self-employed artisan gave way to the wage laborer. Prior to industrialization, workplace accidents were less frequent because workers either worked alone or enjoyed a close working relationship with their employer. Furthermore the close personal relationship between employer and employee often ensured that employers paid for injuries--there was little question about why an accident occurred or who was at fault.[65] Also, because labor was in shorter supply,

---

[64]The urban population went from 6 million in 1860 to 44 million in 1910 and by 1920, more than half this nation's population lived in urban areas. Tindall and Shi, *America: A Narrative History,* 631.

[65]Harry Weiss, "Employers' Liability and Workmens' Compensation," in *History of Labour in the United States, 1896-1932,* ed. John Rogers Commons et al. (New York: A.M. Kelley, 1966 [1935]), 564; Christopher L. Tomlins, *Law, labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993), 260.

employers were more likely to be interested in the long term services of their employees.

As products traditionally made in homes or small workshops with a small number of employees began to be manufactured in factories with many employees, the nature of work changed. The close relationship between employer and employee that characterized the pre-industrial economy did not exist in the factory. Absent personal ties, employers viewed employees as capital, rather than as individuals. Employers saw employees as expendable because an injured employee was not a threat to overall productivity--there was always someone else to take his place. This impersonal relationship meant that "no ties of blood or love prevented one cog in the machine from suing the machine or its owners."[66]

The nature of the work done also changed with industrialization. Advances in technology segmented work into distinct individual tasks. While specialization improved productivity, it also made work more repetitive and rote. Mechanization and connection to power sources allowed bigger and bigger machines to operate faster. Furthermore employees were expected to work longer hours than before industrialization. As markets expanded, nationally and internationally, employees were encouraged to make more products, and were often paid by the number of

---

[66]Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), 410.

products they made ("piece work") rather than the number of hours they labored, a system which encouraged even longer hours. Repetitive tasks, fast machines, and long hours compromised safety, which resulted in more (and more serious) accidents.

Lawrence Friedman identifies the importance of large industry, and specifically the railroad, in the development of tort law. As he puts it, "the railroad created the law of torts."[67] With more injured workers, and little employer-employee rapport, tort law came in to regulate these new relationships. According to Friedman, "[t]his branch of law [torts] deals above all with the wrenching, grinding effects of machines on human bodies. It belongs in the world of factories, railroads, and mines."[68]

Railroads were vital to industrialization.[69] The railroad took advantage of the technological innovations of the first wave of the Industrial Revolution (such as the steam engine and iron production) to be ready when the second wave hit the

---

[67]Ibid.

[68]Lawrence M. Friedman, *American Law: An Introduction* (New York: W.W. Norton and Company, Inc., 1984), 144.

[69]Historians disagree over the importance of the railroad in the development of nineteenth-century America. Robert Fogel, for one, argued that the contribution made by railroads was not as crucial as others maintained. Robert W. Fogel, *Railroads and American Economic Growth: Essays in Economic History* (Baltimore: Johns Hopkins University Press, 1964).

United States.[70] Not only did railroads represent a single industry born from technological innovations, they also represented a lifeline for other industries. Railroads allowed access to both raw materials and to markets; they stimulated the economy, creating surplus capital to invest in other industries; they supported the iron, lumber, and coal industries; and they created new profit making corporations that served as models for other industries.[71]

The construction of railroads in the United States was so supported by federal, state, and local governments that changing the legal system to favor railroads, as this chapter discusses later, seemed logical. Between 1852 and 1870, Congress gave over 100 million acres to land promoters who promised to build railroads across the West. State and local governments gave over 280 million dollars in cash or credit to help build railroads.[72] Federal, state, and local governments realized the importance of the railroad early on. Railroads could

---

[70]For more information on the development of the railroad system, see Walter Licht, *Working for the Railroad* (Princeton: Princeton University Press, 1983) and Fogel, *Railroads and American Economic Growth.*

[71]Before the widespread use of railroads, other means of transportation helped to fuel industrialization. River transportation by steamboat, turnpikes, and canals also helped move goods and raw materials, but did not do so on the scale that railroads would. Alan Brinkley, *The Unfinished Nation: A Concise History of the American People* (New York: McGraw-Hill, Inc., 1993), 175-180.

[72]Fogel, *Railroads and American Economic Growth*, 3.

[73]Railroads were even responsible for our modern time zones. In 1883, railway executives divided the nation into four time zones, the ones we still use today, and Americans began to abide by the rhythm of the railroad industry. Bruce Laurie, *Artisans into Workers* (New York: Hill and Wang, 1989), 114.

bring business, work, finished goods, and people to even the most remote towns.[73] Railroads eventually became the primary American transportation system and remained so until the construction of interstate highways in the mid-twentieth century.[74]

The United States not only inherited the Industrial Revolution from England, it also adapted English laws to deal with the concomitant changes. The American legal tradition of liability for negligence (fiscal responsibility based upon fault) comes from the English legal tradition. In the eighteenth and most of the nineteenth centuries, negligence referred "to failures to perform a specific duty—often a contractual one. It was not defined as a failure to measure up to a general standard of care, the behavior of the reasonable man."[75]

When injured employees turned to the legal system for redress, judges looked to the common law for answers because a comprehensive body of employers' liability law had not yet developed. English common law, which was widely adopted in the United States, held that an employer was like a master while the employee was akin to a servant. For example, the master was responsible for

---

[74]Brinkley, *The Unfinished Nation*, 222-224.
[75]Friedman, *History of American Law*, 262.

the actions, including civil wrongs, done by his servant.[76] Because the Industrial Revolution had started earlier in England, English tort law had adjusted to the new workplace problems and offered a stable legal system that encouraged enterprise and rewarded initiative. American judges borrowed heavily from English common law when adjudicating industrial accidents.

The common law doctrines of employers' liability date back to the English case, *Priestly v. Fowler*, decided in 1837.[77] In *Priestly*, a butcher's driver sued his employer when he was injured by a tipped cart that had been overloaded by another employee. The standing law at the time was that a master (employer) could be held liable for injuries to a third party caused by the negligence of his servant (employee). In *Priestly*, the judge did not follow established precedent and denied recovery to the injured driver, finding it would be absurd to hold an employer responsible for injuries to one employee arising out of the negligence of another employee. This theory that a master should not be liable for harm done by one servant to another became known as the fellow-servant rule.

The English common law rule quickly found its way into the United States. One of the earliest cases affirming the common law of employer liability was *Murray v. South Carolina Railroad*, decided by the South Carolina Supreme Court

---

[76]Hall, *Magic Mirror*, 124. For a discussion of colonial master servant law, see Tomlins, *Law, Labor, and Ideology,* 223-294.

[77]*Priestly v. Fowler*, 3 M. & W. 1 (England 1837).

in 1841.[78] In *Murray*, the Court overturned the jury verdict against an employer for its employee's injury. Murray, a locomotive fireman, lost his leg when a train derailed. In overturning the initial verdict, the Court affirmed that an employer did not owe a responsibility to his employee unless directly responsible for the injury.

The case that firmly embedded the English common law idea of employer liability came from Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court. Most historians attribute the foundations of American tort law to Shaw and his introduction of "the principle of blameworthiness; that there could be no liability without fault."[79] Shaw extended this principle in the leading employer liability case, *Farwell v. Boston and Worcester Railroad.*[80] Farwell, an engineer for the Boston and Worcester Railroad, had his right hand crushed when another employee improperly threw a switch, causing an engine to tip over. Speaking for the unanimous court, Shaw relied on the fellow-servant rule (first announced in *Priestly v. Fowler*) to find that the railroad could not be held liable for an injury to one employee caused by another employee. Shaw concluded that a person takes the risk of injury when working with others and that this is an

---

[78]*Murray v. South Carolina Railroad*,1 McMullen 385 (South Carolina, 1841).

[79]Hall, *Magic Mirror,* 124.

[80]*Farwell v. Boston and Worcester Railroad,* 4 Metcalf 49 (Mass., 1842).

ordinary risk that the employee accepted.[81] Shaw explained that because the employer was removed from direct supervision of all employees, it was unfair to hold him liable for such injury.[82]

As industrialization continued and workplace accidents increased, more employees sued their employers, which led to the development of a body of precedent to govern workplace liability. The courts treated workplace injuries like any other harms or torts, but established a few specialized employer defenses. Injured employees sued their employers, claiming the employer was negligent and should therefore pay for all harms resulting from the employers' actions. At common law, the right to sue for negligence was considered a personal right and not transferable upon death. This limitation created an appalling situation whereby it was less expensive for an employer to "kill" their employees than to injure them, because an injured employee could sue, but a dead employee's right to sue died with him.[83] This reality was hardly an incentive to provide a safe workplace.

---

[81]In *Farwell,* Shaw also explained why non-employees like passengers or bystanders could recover from injuries caused by the railroad. The Court found that although the passenger and the guest entrusted their safety to the care of others, the employee had not. The employee knew that for his own self-preservation, he must exercise caution as the circumstances required. Shaw found that the employee also had a duty to exert moral suasion and social pressure on his fellow servants. Richard A. Epstein, "The Historical Origins and Economic Structure of Workers' Compensation Law," *Georgia Law Review* 16 (Summer 1982): 775-819.

[82]For a more detailed discussion of early cases discussing employer liability for workplace injury see Tomlins, *Law, Labor, and Ideology,* 333-347.

[83] Weiss, "Employers' Liability," 567.

Negligence meant that liability was only assigned where fault could be established. If an employee could not show that his injury was the responsibility of his employer, he could not recover. Furthermore, the employee bore the burden of providing that the employer was negligent.

In adjudicating a claim for negligence, a court would hold employers to a "reasonable" standard of care. In reality, this meant that employers were required to comply with all statutes, laws, or codes enacted for the protection of employees.[84] Reasonable care also meant that the employer had to supply the employee with a safe place to work, furnish him with safe tools and equipment, enforce rules of safe conduct, and issue warnings about dangers.[85] The employee not only had to show that the employer had done something wrong or failed to exercise due care, but also had to demonstrate that the negligence of the employer was the proximate (or direct) cause of the injury. The required showing of proximate cause functioned as a heightened burden of proof on workers and often allowed employers to escape liability.

If the employee overcame this initial obstacle by proving that the employer was negligent, and that this negligence was the proximate cause of the injury, the employer retained other common-law defenses to avoid liability. These defenses

---

[84]Roy Lubove, "Workmen's Compensation and the Prerogatives of Voluntarism," *Labor History* 8 (Fall 1967), 254-279.

[85]Weiss, "Employers' Liability," 565.

were the assumption of risk doctrine, the fellow-servant rule, and contributory negligence.

The assumption of risk doctrine relieved an employer from liability if he could show that the employee knew of a dangerous condition but continued to work despite that condition.[86] This defense was often used by employers in dangerous industries who could simply show that a certain risk was inherent in an industry. For instance, a railroad owner could allege that train derailment was a common risk of railroad employment and workers assumed injuries resulting from this risk. The assumption of risk defense allowed employers to avoid compensating injured workers even when the employer's safety violation caused the accident.[87] More often than not, this defense protected the very harm or danger causing the injury because it was so common. The defense ordinarily blocked the employee's compensation for these "commonplace" risks.

The fellow-servant doctrine also protected employers from liability. This defense applied when the employer could show that the actions of another employee, termed a "fellow servant" at common law, caused the complaining

---

[86]Cooley defines assumption of the risk as "by virtue of the contract of service, the servant assumes the usual and ordinary risks incident to the employment; also such as are obvious and patent to a person of ordinary observation." Thomas M. Cooley, *A Treatise on the Law of Torts*, ed. John Lewis (Chicago: Callaghan & Company, 1907), 528-529.

[87]Weiss, "Employers' Liability," 566.

employee's injury.[88] While the legal relationship between employer and employee was that of master and servant, the common law continued to view the servant as a mere extension of a master. Because under common law a master could not sue himself for injuries, a servant could not sue his master as that situation also presented the master suing himself, a legal impossibility.[89] Still, the common law provided a course of action for the injured party: he could sue the fellow employee who caused the harm. This avenue was usually pointless however, because the negligent employee was himself a wage laborer, without the financial resources to pay a judgment.

Under the common law, the defense of contributory negligence provided a final means for employers to avoid liability. An employer could allege contributory negligence if the injured party was at fault in any way. Once the employer alleged the employee was even partially at fault, the burden of proof to show that he was not negligent fell on the employee.[90] This burden was difficult for workers to meet. They were often at least partially at fault because of the risks

---

[88]Cooley defines the fellow-servant rule as "[t]he rule which exempts the master from responsibility for injuries to his servants, proceeding from risks incidental to the employment, extends to cases where the injury results from the negligence of other servants in the same employment." Cooley, *A Treatise on the Law of Torts*, 541.

[89]The fellow-servant rule stood despite the doctrine of respondeat superior, which held an employer liable for damages done to a third party by an employee. For an explanation of respondeat superior, see Robert Campbell, *The Law of Negligence* (London: Stevens and Haynes, 1871), 55-61.

[90]Cooley, *The Law of Torts,* 1457.

and dangers inherent in their job or the substandard tools provided them, yet even under the most hideous conditions, employers used this defense to avoid liability. If the employee failed to prove the absence of his own negligence, there could be no recovery. Even a small portion of employee blame under the contributory negligence defense left the injured employee with no award.

Assumption of risk, the fellow-servant rule, and contributory negligence kept sympathetic plaintiffs away from kindhearted juries. Judges could, and often did, accept these defenses and dismiss cases, leaving injured plaintiffs with little recourse because they lacked the resources to appeal. These common law defenses often left workers unable to prevail in workplace liability lawsuits, because the legal system chose to assign the costs of industrial accidents to employees and not employers.[91] These defenses, their application, and the legal outcomes worked together to push industry ahead. Thanks to nineteenth-century judges and lawmakers, industrial workers, especially railway workers, bore the cost of industrial accidents.

Legal historians like Lawrence M. Friedman and Kermit L. Hall believe that assigning liability was the courts' expression of where resources were best allocated. If a growing business were forced to pay for all harms caused to employees, that business would not have the capital to grow. To encourage risk-

---

[91]Hall, *Magic Mirror*, 125.

taking entrepreneurs, courts and legislatures redirected workplace liability.[92] Legal historians reason that if entrepreneurs bore the costs of compensating injured employees, there would have been less capital to promote economic growth. If strict liability for workplace accidents had been adopted, many industries would have been drained of their economic blood. Lawmakers and judges, recognizing the need for a healthy industrial marketplace, settled upon negligence as a standard.[93]

According to Morton J. Horwitz, the negligence standard helped to feed the growing economy for a nation that needed industrialization to fuel its expansion.[94] "Negligence . . . was the doctrine of an emerging entrepreneurial class that argued that there should be no liability for socially desirable activity that caused injury without carelessness."[95] This principle allowed private law (such as tort law and employer liability law) to subsidize business. Judges and lawmakers effectively reduced the cost of doing business and allowed businesses to retain all possible capital for growth, rather than demand that they compensate injured employees. By assigning liability to workers, judges relieved risk-taking entrepreneurs and encouraged further investment and economic growth. The leading industry of the

---

[92]Ibid., 123.

[93]Friedman, *History of American Law*, 410.

[94]Morton J. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 123.

[95]Ibid.

era, railroads, was particularly adept at exercising these defenses to reduce costs. They also received direct financial support from local communities, the federal and state governments, and individual workers in the form of subsidies, stock subscriptions, land grants, and tax exemptions.

Legal scholars and judges like Richard A. Posner agree with the historians. Posner argues that the result of the negligence principle and the employers' defenses was to shift the expense of industrialization from business to employees. Posner argues that, "[a]ccident costs were 'externalized' from the enterprises that caused them to work and other individuals injured as a byproduct of their activities."[96] Posner goes on to state that judges upheld these defenses and placed the burden on employees because of their "desire to subsidize the infant industries."[97] Law (through judges and legislators) was used to keep business growing and allow industry to expand. Courts assigning liability for workplace accidents to workers, kept government at bay and allowed business to grow.

While the common law was suited to a pre-industrial society, it was inefficient in an industrial one. The industrial accident rate outstripped the expectations of lawyers and judges. At the turn of the twentieth century, industrial accidents in the United States claimed about 35,000 lives and inflicted nearly 2

---

[96]Posner, "A Theory of Negligence," 15.
[97]Ibid.

million injuries per year.[98] As early as the 1890s states began to revise employers' liability, at first by modifying the employers' defenses. Most state legislatures passed laws or embraced judicial trends that limited the employers' common law defenses well before the passage of workers' compensation regimes.

According to Harry Weiss, legislation enacted prior to workmen's compensation divides into three categories.[99] First, some Progressive Era legislatures passed laws that denied employers the ability to enforce contracts against employees who had waived their right to hold employers liable for workplace injuries. Second, many states passed statutes that allowed employees' heirs to sue employers. Third, state legislatures passed statutes eliminating or altering the employers' common-law defenses of assumption of risk, the fellow-servant doctrine, and contributory negligence. Because all three defenses were created by judges, as part of the common law, they were subject to revision by the states' legislative bodies, which acted independently.

By the 1890s, a handful of states had modified the assumption of risk doctrine with statutes, stating that an employee's knowledge of safety violations would not bar recovery. Nearly twenty more states by 1908 had restricted the

---

[98]Friedman, *History of American Law*, 422.

[99]Lubove, "Workmen's Compensation and the Prerogatives of Voluntarism," 261.

scope of the assumption of risk defense.[100] Most often, safety laws incorporated provisions that knowledge by employees of safety violations would not bar recovery for workplace injuries.[101]

Modification of the fellow-servant rule took two forms: elimination of the defense, and creation of exceptions making the rule less harsh. By 1908 the fellow-servant defense had been completely eliminated in sixteen states.[102] Those states that did not eliminate the fellow-servant doctrine made significant changes, limiting the doctrine with the "vice principal" and "departmental" rules. The "vice principal" rule held that employees in a superior position to the employee alleging harm were not fellow servants. The rationale behind this exception was that those employees in superior positions could help avoid harms or make certain that employees under them followed all safety precautions. The courts utilizing this exception did not consider supervisors to be fellow servants. The "departmental" rule limited the fellow servant defense to employees in the same department. The rationale behind this exception was that as industry grew and companies became larger, employees in different departments had no control over one another and essentially functioned as though they worked for different companies.

---

[100]Lubove, "Workmen's Compensation and the Prerogatives of Voluntarism," 261.

[101]Weiss, "Employers' Liability and Workmen's Compensation," 569.

[102]Ibid. These states were Arkansas, Florida, Georgia, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Okalahoma, South Dakota, Texas, and Wisconsin.

State courts and legislatures also attacked the defense of contributory negligence. Changes to this defense came in terms of "comparative" or "proportional" negligence. In states adopting "comparative negligence" legislation, injured plaintiffs would still receive partial compensation if the court found both the employee and employer negligent. After 1906, several states modified the contributory negligence defense to allow recovery under the law of "proportional" negligence.[103] States that adopted proportional negligence legislation awarded plaintiffs judgments reduced by the portion of negligence attributed to them. Comparative and proportional negligence statutes allowed injured employees to collect some damages even if they were found partially negligent. Some states also limited the contributory negligence defense by placing the burden of proving the case on the defendant employer, not the worker.[104] Switching the burden of proof to the defendant gave the advantage to the injured plaintiffs who would prevail if the defendant failed to overcome the burden.

Employers protested these modifications to their available defenses because they no longer could rely on these defenses to evade liability. Employers frequently claimed that modifications to these defenses either violated due process

---

[103]Lubove, "Workmen's Compensation and the Prerogatives of Voluntarism," 261.

[104]Weiss, "Employers' Liability and Workmens' Compensation," 569.

or freedom of contract. Employers argued that modifications to these defenses determined in advance who would be liable. In addition, employers were frustrated by laws that failed to uphold contracts as against public policy where employees agreed in writing to assume the risk of accidents and the risk of negligence of fellow servants. Despite employers' attempts to overcome these limitations, almost without exception, state courts upheld the changes to employers' liability laws as constitutional.[105]

In examining the whittling away of employers' defenses, railroads deserve special mention. Railroads were one of the first industries attacked because of the frequency of accidents as well as the anti-railway sentiment of many legislatures.[106] Georgia and Iowa were among the first states to eliminate the fellow-servant defense, passing laws abrogating the fellow-servant defense for railroad accidents in 1856 and 1862, respectively.[107] By the mid-1890s, six states had abolished the co-servant rule for railroad injuries, and the number increased to sixteen by 1908.[108] Railroads were often criticized because of their competitive

---

[105]Melvin I. Urofsky, "State Courts and Protective Legislation during the Progressive Era: A Reevaluation," *Journal of American History* 72 (June 1985): 63-91.

[106]Weiss, "Employers' Liability and Workmen's Compensation," 567.

[107] Ibid.

[108]Lubove, "Workmen's Compensation and the Prerogatives of Voluntarism," 261.

nature, treatment of local employees, and the robber-baron owners. This attention was well deserved, as the railway injury rate doubled between 1889 and 1906.[109]

Employers in general, and railroad entrepreneurs specifically, were not the only ones expressing concerns over the development of employers' liability laws. Progressive reformers sought change as well, but in a different direction—to improve conditions for workers. As business grew uninterrupted, injuries increased, yet the law failed to provide relief which made workers a sympathetic lot. New attention to social struggle, including attempts at changing the plight of the worker, interested progressive reformers. The Progressive Movement "attempted to end corruption, oligarchical power, and social privilege in politics, and to curb the power of big business, but within the framework of a constitutional government and capitalist economy."[110] Progressives campaigned for several issues affecting industrial development, like limiting working hours, ending child labor, promoting factory safety, improving urban living conditions, and increasing pay.

In the late nineteenth century new social, political, and economic views also influenced employer's liability law. Journalists were one part of the Progressive Movement that brought public attention to social problems, including the problem

---

[109]Friedman, *History of American Law*, 422.

[110]Lawrence M. Friedman and Harry N. Scheiber, eds., *American Law and the Constitutional Order* (Cambridge: Harvard University Press, 1978), 267.

of workplace injury. Crystal Eastman, in her examination of workplace accidents in Allegheny County, Pennsylvania in 1907-08, evaluated a year's worth of industrial fatalities and three months' worth of industrial injuries.[111] She analyzed the economic consequences and their impact on families to show the need for workplace accident liability reform. Eastman also examined the reasons for these accidents and discovered productivity demands, long hours, and fatigue often over-exerted the workers and led to less focus on workplace safety. She concluded that most of the accidents were not caused by workman negligence. Even where human error was involved, it was often due to circumstances beyond the worker's control. She argued that shifting responsibility to industry and away from the individual worker would improve workplace safety.

As progressive reformers began to inspire changes in employer liability law, employers, workers, and unions alike took an interest in the alteration of

[111]Crystal Eastman, *Workplace Accidents and the Law* (New York, 1910).

workplace liability law.[112] With the increase of appeals and publicity from workplace injuries, juries began to favor injured employees. Jury awards varied in size and often depended on an employer's ability to pay, rather than the nature of the injury.[113] "Verdicts in favor of workers were becoming more common and their amounts increased to $5,000, $10,000, and even $25,000."[114] As more employees filed lawsuits and more appealed adverse judgments, employers and their insurance companies could no longer count on higher courts reversing or reducing judgments against them.[115] Conversely, because employers' defenses existed in most states, workers, social reformers, and labor unions could not rely on courts holding employers liable.

---

[112]In Missouri, "[e]mployers, labor union representatives, and damage-suit attorneys exercised substantial influence over the entire adoption process. Each group offered its own bills to the Missouri General Assembly, lobbied legislators, fed them information for the debates, and once the legislation was passed, used the referenda administrative process to subvert any legislative actions that were contrary to their interests." Shawn Everett Kantor and Price V. Fishback, "Coalition Formation and the Adoption of Workers' Compensation: The Case of Missouri, 1911 to 1926," in *The Regulated Economy: A Historical Approach to Political Economy,* ed. Claudia Goldin and Gary D. Libecap (Chicago: University of Chicago Press, 1994) 268. In Illinois, the passage of workers' compensation laws resulted from cooperation between labor, business, and reformers. Castrovinci's study shows how business supported the passage of workers' compensation "as a way to reduce instabilities engendered by the antiquated system of common-law liability and block the more fundamental change sought by others." Joseph Castrovinci, "Prelude to Welfare Capitalism: The Role of Business in the Enactment of Workmen's Compensation Legislation in Illinois, 1905-12," *Social Service Review* 50 (March 1976): 80-102, 81.

[113]Castrovinci, "Prelude to Welfare," 87.

[114]Ibid.

[115]Ibid.

Accordingly, employers began to support some form of workers' compensation legislation. Despite the common law defenses available to them, many employers were dissatisfied with the common law because defending claims often meant expensive litigation and the uncertainty of the outcome. Furthermore, "[t]he market value of the right to action was increasing by the early twentieth century because of statutory modifications of the common law which improved the employee's position."[116] Because some workplace liability statutes shifted fees to the employers, employees found it easy to find personal injury attorneys willing to take cases on a contingency fee basis. Also, employers began to notice the tendency of lower-court judges to favor plaintiffs, necessitating appeals, further litigation and more expense.[117]

Specifically, businessmen understood that workers' compensation, while bringing an acceptance of liability, would also bring fixed damage awards for employees that they could budget.[118] According to Shawn Everett Kantor and Price V. Fishback, employers supported such legislation anticipating that they

---

[116]Lubove, "Workmen's Compensation and the Prerogatives of Voluntarism," 260.

[117]Ibid.

[118]Some large corporations, such as United States Steel, supported voluntary workers' compensation plans. In 1910, U.S. Steel announced a plan to provide injured single workers 35 percent of weekly wages, married workers 50 percent, and an additional 5 percent for each child.

would be able to pass the cost on to workers or consumers. These studies have shown that semiskilled and unskilled workers actually experienced wage reductions after the adoption of workers' compensation.[119] Statistics demonstrate the willingness of businesses to support reform. A 1910 survey by the National Association of Manufacturers (NAM) of 13,000 businessmen showed that over 99 percent favored automatic compensation to reduce waste and put an end to the worker hostility created by the common law.[120]

Employers also saw the harm in having employees so diametrically opposed to the interests of their employers. Under the common law, all disputes had to be settled in court or settled by the threat of court, making the employer/employee relationship a potentially hostile one. Business leaders wanted to support a "harmony of interests with wage earners *via* a common plan of social action" by discouraging organized labor from pursing radical unionism and encouraging its support of conservative unionism.[121]

Along with employers, insurance companies favored the passage of workers' compensation legislation. Since the 1880s, some employers and trade

---

[119]Everett and Fishback, "Coalition Formation," 266.

[120]Castrovinci, "A Prelude to Welfare," 88.

[121]Robert F. Wesser, "Conflict and Compromise: The Workmen's Compensation Movement in New York, 1890s-1913," *Labor History* 12 (Summer 1971): 341-372.

associations had maintained private employer-liability insurance. Often, employers passed the costs of accident insurance on to the employees, or employees would pay for accident insurance through their trade association. "Private insurance premiums rose from about $200,000 in 1887 to more than $35,000,000 by 1912."[122] Insurance companies saw the potential business that mandatory workers' compensation legislation would generate and lobbied for such legislation at the state and federal levels.

Social reformers and labor unions also supported workers' compensation legislation. While reformers agreed with employers on the need for workers' compensation, their reasons differed. Progressives and other social reformers saw the social costs of industrialization, and realized that workers bore the brunt of workplace injury. Under the common law, injured employees spent between 30 and 60 percent of their damage awards on lawyers' fees, substantially reducing the amount left to replace lost wages.[123] Furthermore, reformers were discouraged by the high cost of insuring against claims. In 1908, employers' insurance premiums totaled $22 million nationally, yet only one quarter of that amount actually reached injured workers. Insurance companies spent the remainder on administrative costs, and marketing or retained those premiums as profits.[124] Because modifying or

---

[122]Urofsky, "State Courts and Protective Legislation," 85-86.
[123]Castrovinci, "Prelude to Welfare," 87.
[124]Ibid.

eliminating the employer's defenses did not substantially change the common law or the need for employees to sue, reformers wanted more radical change.

Labor unions joined with social reformers in the formation and passage of workers' compensation laws, despite the unions' original resistance to codification of workers' compensation.[125] At first reluctant to participate because weaker employers' defenses increased workers' awards, union members and leaders also believed big business controlled the government compensation schemes.[126] Furthermore, labor union members hesitated because "the union would be 'deprived of its essentials of independence, self-direction and elastic adaptation to the needs of a forceful mass mechanism.'"[127] Basically union leaders feared that satisfaction on the part of workers, even partial satisfaction, would reduce workers' loyalty to unions.

In their initial disinclination to support workers' compensation, organized labor lobbied state legislatures to continue to liberalize employers' liability laws.[128] But as business began supporting workers' compensation legislation, labor leaders realized change would come. Initially, labor unions called for full compensation (lost wages), retention of the right to sue at common law before a jury, and

---

[125]Wesser, *Conflict and Compromise*, 347.

[126]Daniel M. Berman, *Death on the Job: Occupational Health and Safety Struggles in the United States* (New York: Monthly Review Press, 1978), 25; Weinstein, "Big Business," 159.

[127]Ibid., 160.

[128]Wesser, *Conflict and Compromise*, 347.

exclusive, state-owned insurance companies maintaining compensation policies, but they were unable to secure this level of compensation.[129] In 1909, the National Civic Federation helped to convince American Federation of Labor President Samuel Gompers that industrial accident insurance and improved liability laws would solve workers' problems.[130] Gompers and other labor leaders recognized that legislation was inevitable, and they wanted to participate in drafting the legislation to ensure the best outcome for their members.

With support from such diverse groups, states began fashioning workers' compensation laws in the early 1900s. Most of these early laws proved to be either too weak and ineffective or were too strong and deemed unconstitutional.[131] As early as 1898, a New York workers' compensation bill died in legislative committee.[132] In 1902, Maryland passed the first workers' compensation law, but it was declared unconstitutional in 1904.[133] In 1906, Montana passed the first state compulsory workers' compensation law with a state co-operative insurance pool.[134] In 1908, Congress enacted a rather weak law granting certain employees

---

[129]Berman, *Death on the Job*, 26-27.
[130]Wesser, *Conflict and Compromise*, 347.
[131]Weiss, "Employers' Liability and Workmen's Compensation," 572.
[132]Ibid., 571.
[133]Ibid.
[134]Ibid., 571-572.

the right to receive compensation for injuries sustained in the course of employment.[135]

Initial workers' compensation laws were unable to solve the problems of workplace accident liability. After early laws failed to adequately provide for workers, many states formed commissions to investigate the complications associated with workplace accidents and to suggest solutions. Forty commissions in thirty-two jurisdictions were appointed between 1903 and 1919.[136] While varying from state to state, the commissions gathered material, held public hearings, talked with injured workers, and nearly unanimously recommended workers' compensation legislation that would end employer immunity.

The commissions generally found that recovery was difficult and only a small portion of injured workers received compensation. They also discovered that recovery was quite slow and employees could not reclaim wages while their cases were in court or the appeals process.[137] Furthermore, most state commissions reported that the current system did not allocate resources well, with administrative and legal costs substantially reducing the sums paid by employers. Finally, the commissions reaffirmed what most employers already knew, that the

---

[135]"This was passed after special emphasis was placed on it by President Theodore Roosevelt in his special message to Congress on January 31, 1908, p. 2, in which he termed the position of federal employees 'an outrage.'" Ibid., 571; 35 U.S. Statutes at Large 556, 1908, approved May 30.

[136]Weiss, "Employers' Liability and Workmen's Compensation," 572.

[137]The appeals process sometimes took up to two years.

current system led to a growing tension between employers and employees.[138] Once the state commissions reported the problems of the existing workplace accident compensation system, legislatures passed more comprehensive and transforming legislation.[139]

In 1911 ten states (California, Illinois, Kansas, Massachusetts, Nevada, New Hampshire, New Jersey, Ohio, Washington, and Wisconsin) passed workers' compensation laws. In 1912 and 1913, eleven more states passed compensation laws (Arizona, Connecticut, Iowa, Maryland, Michigan, Minnesota, Nebraska, Oregon, Rhode Island, Texas, and West Virginia). In 1915 and 1916, nine additional states and three territories enacted workers' compensation laws (Colorado, Indiana, Kentucky, Maine, Montana, Oklahoma, Pennsylvania, Vermont, Wyoming, Alaska, Hawaii, and Puerto Rico). During 1917 and 1918, eight states plus Congress acting for the District of Columbia passed workers' compensation laws (Alabama, Delaware, Idaho, North Dakota, South Dakota,

---

[138]Weiss, "Employers' Liability and Workmen's Compensation," 573.

[139]In 1909 New York passed a state workmen's compensation act, but it was struck down by the New York Court of Appeals in 1911. Urofsky, "State Courts," 86. The court found that holding employers strictly liable was a taking of property without due process of law. *Ives v. South Buffalo Ry. Co.*, 201 N.Y., 285 (New York). Despite this ruling, other states upheld similar workers' compensation laws. In 1915, in two cases, the New York Court of Appeals upheld a plan almost identical to the one struck down in the *Ives* decision. For more information on New York, see Robert Asher, "Failure and Fulfillment: Agitation for Employers' Liability Legislation and the Origins of Workmen's' Compensation in New York State, 1876-1910," *Labor History* 24 (Spring 1983): 198-222, 198.

Tennessee, Utah, Virginia, and District of Columbia). From 1920 to 1932, only two states enacted workers' compensation laws (Missouri and North Carolina) and by 1932 only four states did not have workers' compensation laws (Arkansas, Mississippi, Florida, and South Carolina).[140]

Nevertheless, railroad companies and workers challenged the constitutionality of the new legislation. In 1917, the United States Supreme Court upheld most states' systems of workers' compensation (including compulsory and elective laws) with an exclusive state fund.[141] By the end of the second decade of the twentieth century, most states had enacted comprehensive workers' compensation laws that withstood constitutional challenges.

Workmen's compensation represented a major breakthrough in the Progressive agenda for welfare capitalism. Workers received long needed aid. Workers' compensation laws also united workers and reformers to secure programs in the interest of both the workers and the railroads. Workmen's compensation was a compromise system, in which each side gave a little, got a little. The injured worker got compensation, whether the employer was negligent or not, and employers identified predictable costs for workplace liability.

---

[140]Weiss, "Employers' Liability and Workmen's Compensation," 575- 577.

[141]An exclusive state fund forced all the state's participating employers to use the state as their insurer. See *New York Central Rail Co. v. White*, 243 U.S. 188 (1917); *Mountain Timber Co. v. State of Washington*, 243 U.S. 219 (1917); and *Hawkins v. Bleakly*, 243 U.S. 210 (1917).

Historians point to the victory of Progressive Era reforms as predecessors to later reform movements, such as the New Deal and the Great Society.[142]

[142]Castrovinci, "Prelude to Welfare Capitalism," 99-100.

CHAPTER 3

INDIANA SUPREME COURT CASES

Industrialization and growth of the railroad industry had an influence on Indiana similar to the national influence discussed in Chapter 2. The common law of employers' liability worked nationally as well as in Indiana to protect employers. Late nineteenth century changes in employer-employee relationships brought on by industrialization led to changes in the Indiana law related to employer liability for workplace accidents. This chapter examines the legal reality of employers' (specifically railroads and interurbans) liability through an analysis of turn-of-the-century Indiana Supreme Court cases.

According to Clifton Phillips in his history of industrial development in Indiana, the period between 1880 and 1920 "encompasses most of the significant political, economic, and social changes" in Indiana's transition from farming to an industrial economy.[143] In 1880, Indiana was largely agricultural. While Indiana

---

[143]Clifton J. Phillips, *Indiana In Transition: The Emergence of an Industrial Commonwealth, 1180-1920* (Indianapolis: Indiana Historical Bureau, 1968), v.

did not industrialize as rapidly as Illinois or Ohio, its industrialization, urbanization, mechanization of labor, and consolidation of transportation networks increased workplace accidents. [144]

Industrialization increased the number of skilled and unskilled wage earners within the total population and changed the nature of work.[145] Industrial working conditions in Indiana were characterized by ten-hour days, and six-day weeks; low wages; periodic pay reductions; high levels of unemployment; and dangerous working conditions.[146] This environment led more injured workers to demand post-accident compensation.

At the same time, members of both political parties called for government solutions to social and economic problems caused by industrialization. Reformers in both parties advocated workers' compensation and child labor laws, regulation of monopolies and trusts, a state income tax, public health measures, conservation of natural resources, women's suffrage, and prohibition of the sale of alcohol.[147] In turn-of-the-century Indiana, these changes were both visible and rapid,

---

[144]Ibid.; James H. Madison, *The Indiana Way: A State History* (Indianapolis: Indiana University Press, 1990 [1986]), 163.

[145]In 1890, 12 percent of workers were employed in the trade and transportation industries; in 1920, those figures jumped to 24 percent. Phillips, *Indiana in Transition,* 323.

[146]Ibid., 324-327.

[147]Madison, *The Indiana Way*, 221.

especially for railroads and interurbans, which led reformers to seek improved working conditions.[148]

Indiana's cities were well connected by railroads by 1880, but by the turn of the century, most lines were owned by out-of-state companies like the Pennsylvania Railway and the New York Central.[149] Hoosiers wanted more and better rail service, but believed they were at the mercy of these large corporations and campaigned against high usage fees.[150] In 1905, the General Assembly established the Indiana Railroad Commission with the power to regulate rates.[151] The increasing number of railroad accidents resulting in injuries and multiple fatalities also brought public attention to the need for safety measures.[152]

Interurban rail service complemented the interstate freight and passenger railroads.[153] First coming to Indianapolis in 1900, these electric-powered cars designed for short-distance passenger transport united the countryside and city.[154]

---

[148]Ibid., 153.

[149]Ibid., 155-56.

[150]For more detailed information on railroads in Indiana see Phillips, *Indiana in Transition,* 224-51.

[151]Madison, *The Indiana Way*, 157.

[152]Phillips, *Indiana in Transition,* 259.

[153]Ralph D. Gray, ed., *Indiana History: A Book of Readings* (Indianapolis: Indiana University Press, 1994), 213.

[154]Madison, *The Indiana Way*, 157.

At the turn of the century, there were 678 miles of electric rail lines.[155] But in 1910 alone, five head-on collisions on Indiana interurbans raised public awareness of the need for safety measures.[156] Most of the dangers associated with heavy freight service also plagued the lighter electric lines. While both rail systems helped stimulate Indiana's transition from a rural agricultural economy to an industrialized urban society, they were also responsible for many of the most serious injuries and deaths in Indiana.

Suits brought by injured employees against railroads found their way into Indiana courts, which were unable to develop a comprehensive case law dealing fairly and quickly with injuries. Most employers did not provide any relief for injured workers, and the few that did, often passed the cost of insurance along to their employees in the form of association dues. When compensation was not forthcoming after accidents, Progressives and others sought legislation to pay injured worker for medical care and lost wages.

This chapter will analyze Indiana Supreme Court cases from 1880 to 1915 to show that tort law with respect to workplace injury failed to recognize the

---

[155]Jerry Marlette, "Indiana's Interurban System," in Gray, *Indiana History*, 229.

[156]Phillips, *Indiana in Transition,* 260.

societal and economic needs of injured railroad men.[157] The same common law principles outlined in Chapter 2 applied in Indiana. Workplace injuries were treated like other torts, governed by the negligence standard that assigned liability only after a demonstration of fault. Furthermore, the same trinity of defenses--fellow-servant, assumption of risk and contributory negligence--were available to Indiana employers accused of workplace negligence.

This chapter examines whether, as many proponents of workers' compensation contended, legislation was necessary to ensure the fair and consistent treatment of injured railroad employees. Broadly, cases analyzed demonstrate the need for comprehensive workers' compensation legislation and offer a snapshot of the legal environment that gave rise to the workers' compensation movement in Indiana.

---

[157]This chapter studies Indiana Supreme Court cases between 1880 and 1915 where the party injured (and the party initially bringing the claim at trial court) was a railroad or interurban employee suing his employer for negligence. Further, the railroad companies, in all cases selected, alleged that they were not liable based upon one of the three discussed defenses. Other cases concerning injuries of railroad passengers or workplace litigation not falling under the purview of employers' liability have not been considered.

However, cases from the Indiana Supreme Court represent only a fraction of the total claims for workplace liability. First, only a small percentage of workplace injuries resulted in legal action. Many injured railroad workers accepted settlements from the employers' insurance companies, often for less than their claims might have brought in court. Wage laborers injured at work could not afford long legal battles, and they were quick to accept what their employers or the insurance companies offered. Because injured employees were often wage laborers and could not afford legal fees, they could not afford to sue their employers. Those who decided to sue for injuries sometimes agreed to give a portion of any potential settlement to their attorneys, reducing the employees' awards. From the fraction of total incidents that went to court, even fewer were appealed to a higher court.

Depending on the structure of the appeals process, parties had already argued in front of one or two courts by the time they appeared before the Indiana

Supreme Court.[158] Because an appeal could take many years, few injured employees could afford to wait out the appeals process. Depending on the structure of the Indiana Supreme Court and the lower appellate courts, appeals often took three to five years, sometimes longer.

The railroad industry provides an efficient place to look at the development of the employers' defenses as well as the need for workmens' compensation because of the frequency and magnitude of railroad accidents and its undeniable importance to the economy of the era. The analysis traces specific trends from

---

[158]The Indiana legislature created various lower courts with the ability to appeal judgments to the Indiana Supreme Court based upon the population of the state and the workload of the Court. Generally, cases examined in this chapter had been in front of one court, and sometimes two depending on the appellate structure. In 1881, the Indiana General Assembly created the five-member Supreme Court Commission that assisted the judges in authoring opinions. *Laws of the State of Indiana, 1881* (Indianapolis, 1881), chap. 17, 92. In 1885 the General Assembly did away with the commissioners because the docket congestion had cleared up. *Laws of the State of Indiana, 1883* (Indianapolis, 1883), chap. 60, 77. Only a few years later, the Court's docket again became overcrowded, but attempts at a constitutional amendment to increase the number of judges failed. Easing the docket with commissioners presented political problems, and the legislature was unwilling to create a permanent appellate court because of the cost. As a temporary solution, the General Assembly created a statutory appellate court in 1891. Charles W. Taylor, *The Bench and Bar of Indiana* (Indianapolis, 1895), 79; *Laws of the State of Indiana, 1891* (Indianapolis, 1891), chap. 37, secs. 1-27, 39. The legislature gave this temporary court a term of six years, with all open cases after the six years turned back over to the Supreme Court. In 1897 and 1899, the legislature extended the life of this court. Robert H. Stanton and Gina M. Hicklin, "The History of the Court of Appeals of Indiana," *Indiana Law Review 30* (1997): 203-231. In 1901 the legislature made the appellate court a permanent court. *Laws of the State of Indiana, 1901* (Indianapolis: W. B. Burford, 1901), chap. 247, sec. 19, 565-570.

1880 through 1915, when the Indiana General Assembly passed a comprehensive workers' compensation law. I have separated the analysis into categories for each employer's defense: the fellow-servant rule, contributory negligence, and assumption of risk. Unlike today, when we assume employers provide a safe workplace, and we rely on workmen's compensation laws to protect injured employees, workers in the late nineteenth century faced a very different legal environment. An injured railroad worker in 1880 received no compensation for a workplace injury unless he sued his employer. Employers focused on high profits and increased productivity and profit by requiring long hours, implementing new (and dangerous) technologies to increase volume, and providing few, if any, safety measures. The drive for profits, coupled with no legal duty to compensate injured employees, left many employees with no option save filing suit against their employers.

Once injured, employees who brought lawsuits against their employers faced several legal obstacles. Employees claimed that their employers were negligent, and this negligence caused their injuries. Employers alleging no liability for injuries generally used one defense, but depending on the facts of the case, sometimes used multiple defenses. In response to complaints, defendants were allowed to allege more than one or alternate defenses. In many of the cases analyzed, the Court discussed the fellow-servant defense in conjunction with either

the contributory negligence defense or the assumption of the risk defense, or all three defenses.

For example, a worker might allege he was injured due to the employer's negligence, with the employer claiming no liability because the worker was himself negligent (defense of contributory negligence), or that the worker's injuries resulted from a danger the worker knew existed (defense of assumption of risk), or that another worker was responsible for the injury (defense of fellow-servant rule). The Court could then decide in favor of the employer based on any one or more of these defenses. Because each defense alone could decide a single case, this chapter examines each defense individually.

The harshness of this regime was somewhat ameliorated by early compensation statutes, but the weakness of the 1893 statute forced injured workers to continue to try their luck in court.[159] Other statutes passed before the 1915 compensation law forced sympathetic judges at the trial or appellate level either to find for the worker or to uphold or reverse a case in favor of the worker. The statutes did not produce a consistent pattern of case law in favor of workers or employers, and thereby did not encourage workers to appeal losing verdicts or employers to offer fair settlements.

---

[159]See Appendices A, B, and C.

The Fellow-Servant Defense

Employers used the fellow-servant defense to argue that another employee, at common law, a "fellow servant," caused the complaining worker's injury. Even if the employer only showed that the fellow servant was partially at fault, this defense would keep the injured employee from collecting damages. Of course, the injured worker could sue the fellow worker who caused the harm. However, this strategy was usually fruitless because the negligent fellow employee was a wage laborer who rarely had the means to pay a judgment.

Between 1880 and 1915, the Indiana Supreme Court decided eighty-three cases where an employer used the fellow-servant defense. Of those cases thirty-five (42%) were decided in favor of the worker and forty-eight (58%) for the defendant employer.[160] Over the period studied, the Indiana Supreme Court became more likely to decide for the injured worker and less likely to find for the railroad company.

Between 1880 and 1911, the Court fairly consistently found that all railroad workers, even if they worked in different departments, were fellow servants. Some of the most egregious cases suggest a willingness of the Court to maintain a conservative attitude and keep out of railroad business. For example, as early as 1885 in *The Indianapolis and St. Louis Railway v. Johnson*, the Court held that a

---

[160]See Appendix A.

switchman who was injured while coupling cars when an engineer negligently backed the engine into the switchyard could not recover against the railroad company because the accident was the fault of the fellow-servant engineer.[161]

The Court continued, until 1915, to find that most railroad workers were considered fellow servants. In *The Baltimore and Ohio and Chicago Railroad Company v. Paul*, the Court held that a brakeman injured when an engineer allowed too many trains in the switchyard was denied recovery because the two workers were fellow servants.[162] The Court's rulings on similar fact patterns remained consistent into the twentieth century, when, in 1907 the Court held again that a brakeman injured by the negligent acts of an engineer was barred from recovery because of the fellow-servant rule.[163]

Generally, when the Court ruled in favor of a worker it focused on a special fact pattern that differentiated the case from others. In 1888 deciding *The Evansville and Terre Haute Railroad Company v. Guyton*, the Court ruled that the railroad company was liable when a conductor of one train was injured when another train hit the train he was riding on.[164] The Court held that the railroad

---

[161]*The Indianapolis and St. Louis Railway v. Johnson*, 102 Ind. 352 (1885).

[162]*The Baltimore and Ohio and Chicago Railroad Company v. Paul*, 143 Ind. 23 (1895).

[163]*Southern Railway Company v. Elliott*, 170 Ind. 273 (1907).

[164]*The Evansville and Terre Haute Railroad Company v. Guyton*, 115 Ind. 450 (1888).

company was at fault because the conductor on the train causing the accident could not be a fellow servant, as he was new and had not been properly trained.

Besides finding that fellow servants must have proper training in order to fit within the fellow-servant defense, the Court was also willing to find that the fellow-servant rule did not apply to injured workers when their injuries stemmed from faulty equipment. In *The Cincinnati, Hamilton and Dayton Railroad Company v. McMullen, Admin.,* the Court found that the estate of a freight train conductor could recover against the railroad company when the handle of his appliance broke and he fell to his death from the moving train.[165] Although the railroad company argued that the conductor's death was due to the negligence of the fellow-servant inspector, the Court held otherwise.

The Court was also willing to find railroad companies liable for worker injuries when the railroad company violated a safety ordinance. The Court sometimes placed the burden of safety and competent repairs on the employer and did not allow the employer to delegate this responsibility to a fellow servant. For example, in *Louisville, Evansville and St. Louis Railway Consolidated Railroad Company v. Miller, Admin.,* when a railroad company continued to run with broken ties so rotten that the spikes could not keep them stable, the Court ruled that the railroad company was liable for injuries to a freight conductor killed in an

---

[165]*The Cincinnati, Hamilton and Dayton Railroad Company v. McMullen, Admin.*, 117 Ind. 439 (1889).

accident caused by these defects.[166] Similarly, the Court ruled in *The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co. v. Sudhoff, Admin.* that the estate of an engineer who was killed when a brakeman negligently left a switch open causing another train to disregard a safety signal could collect against his employer.[167] The Court found that the fellow-servant defense did not apply.

While the cases discussed above show an occasional willingness to find for injured workers, the Court developed narrow exceptions to the harsh fellow-servant rule that allowed some workers to recover by limiting the definition of fellow servant to include less than all other workers. However, the Court interpreted this exception narrowly, and railroad companies often successfully circumvented it.

As railroads grew in coverage and complexity of operation the Court found that the fellow servant rule made less sense. Fewer workers performed cooperative tasks, and it thus became more difficult to hold one worker responsible for another worker's injury if they did not work directly with each other. Some workers at the same location were actually employed in different departments under the supervision of different managers. Furthermore, as tasks became more

---

[166] *Louisville, Evansville and St. Louis Railway Consolidated Railroad Company v. Miller, Admin.*, 140 Ind. 685 (1895).

[167] *The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co. v. Sudhoff, Admin.*, 173 Ind. 314 (1910)

mechanized and trains became faster and more dangerous, workers had less direct control over their own work.

To acknowledge the continued responsibility of railroad management, the Court began to recognize an exception to the fellow-servant rule known as the "vice-principal exception" by which supervisors could be held as masters liable for negligent acts. The Court reasoned that a supervisor became the vice-principal or representative of the employer (or master), and the action was therefore performed, for legal purposes, on behalf of the employer.

The Court first introduced the vice-principal exception in 1894. In *The Ohio and Mississippi Railway Company v. Stein*, the Court held a railroad foreman to be a vice principal.[168] In this case, a railroad brakeman was injured when a defective car loaded with heavy stone detached from the main engine and hit another car, causing injury to the worker when one of the stones fell onto his foot. The Court held the railroad company liable for this act because the foreman knew that the car was defective, and he stood in the shoes of the employer. The Court explained that the test for determining whether an actor was a fellow servant or a vice principal was based on the actions, and the not the title, of the actor. For instance, this same foreman could have been considered a fellow servant had he been working alongside the injured worker. However, because he was acting as a

[168] *The Ohio and Mississippi Railway Company v. Stein*, 140 Ind. 61 (1894).

superior at the time, the Court found him to be a vice principal. While the vice-principal exception helped chip away at the fellow-servant defense, because the determining factor was action and not title, room remained for maneuvering by skilled railroad lawyers.

Notwithstanding the Court's seeming new willingness to hold railroad companies liable for workplace injury and limit the fellow-servant defense, the Court soon began limiting the vice-principal exception. In 1897, the Court found a railroad foreman to be a fellow servant of a railroad repairman in *Kerner, Admin. v. The Baltimore and Ohio Southwestern Railway Company.*[169] In *Kerner*, the railroad foreman struck and killed the railroad repairman while driving a large spring into an engine with a heavy iron. The Court held that the foreman and the repairman were fellow servants and precluded recovery on the part of the worker's heirs. This decision partially closed the ostensibly open window created by the vice-principal exception.

Between 1894 and 1915, railroads used this exception nine times. The railroad worker prevailed in only three (33%) of these cases. In *Louisville, New Albany and Chicago Railway Company v. Heck, Admin.,* two trains from the same railroad company collided near where the plaintiff, a railroad fireman, was

[169]*Kerner, Admin. v. The Baltimore and Ohio Southwestern Railway Company*, 149 Ind. 21 (1897).

working, killing him.[170] In ruling for the estate, the Court held that the superintendent of the railroad crossing failed to exercise proper precautions and was responsible for the accident, finding the superintendent a vice principal, and not a fellow servant. In *Chicago, Indianapolis & Louisville Railway Company v. Williams, Admin.,* the Court ruled that a railroad supervisor who backed an engine onto a track before the coupler gave notice he was ready caused the coupler's death. [171] The supervisor here was a vice principal and not a fellow servant. The final vice principal case decided for the worker was *Indiana Union Traction Company v. Long.*[172] In this case, an interurban car jumped its tracks due to a defective track tie and the plaintiff was injured. The defendant argued that it was not liable because safety inspections had been delegated to a fellow servant. But the Court held that upholding safety standards could not be delegated to a fellow servant.

Despite this small indication of change, the Court's application of the vice-principal exception was haphazard and proved not to temper the railroad companies' excesses. Of the nine cases discussing the vice-principal exception,

---

[170]*Louisville, New Albany and Chicago Railway Company v. Heck, Admin.*, 151 Ind. 229 (1898).

[171]*Chicago, Indianapolis & Louisville Railway Company v. Williams, Admin.*,168 Ind. 276 (1898).

[172]*Indiana Union Traction Company v. Long*, 176 Ind. 532 (1911).

[172]*Robertson v. The Chicago and Erie Railroad Company*, 146 Ind. 486 (1896).

the defendant railroad companies prevailed in six (66%) of them. Only two years after first introducing the vice-principal exception to the fellow-servant defense, the Court began to limit the exception. In *Robertson v. The Chicago and Erie Railroad Company*, the Court held that a supervisor in a railroad machine shop was a fellow servant to a worker who was injured lifting a steam chest on a locomotive, despite the fact that the worker was following the orders of his supervisor.[173]

The Court made a similar ruling in *Indianapolis Traction and Terminal Company v. Kinney, by Next Friend*, finding that a foreman of a section gang was a fellow servant to an injured worker.[174] Here the Court explained that the foreman could not be considered a vice principal because he was working with the plaintiff, despite the orders he gave to the plaintiff. As late as 1912, the Court continued to narrow the fellow-servant defense. In *Vandalia Railroad Company v. Parker*, the Court held that a section laborer who fell off an overcrowded hand car operated by the railroad foreman could not recover for his injuries.[175] This Court

---

[173]*Robertson v. The Chicago and Erie Railroad Company*, 146 Ind. 486 (1896).

[174]*Indianapolis Traction and Terminal Company v. Kinney, by Next Friend*, 171 Ind. 612 (1908).

[175]*Vandalia Railroad Company v. Parker*, 178 Ind. 138 (1912). For additional cases finding for the defendant railroad companies despite an allegation that the party causing the harm was a vice principal rather than a fellow servant, see *Southern Indiana Railway Company v. Harrell*, 161 Ind. 689 (1903), and *The Southern Indiana Railway Company v. Martin*, 160 Ind. 280 (1903).

reasoned that under the common law, a section foreman employing and discharging men was a vice principal, but a section foreman directing activities after the work day, as was the case here, was a fellow servant.

While the vice-principal exception did not alter the landscape of employers' liability law dramatically, it did offer a glimpse of things to come. The fellow-servant defense provided railroad companies a way to limit their liability, arguing that they should not be held liable for the negligent acts of one worker who injured another. The vice-principal exception tempered this situation. Under this exception, plaintiffs could argue that the parties causing their injuries were in fact in supervisory or master-like positions, rather than fellow workers. Still, based on the Indiana Supreme Court cases, the vice-principal exception did little to improve the plight of the injured worker facing the fellow-servant defense. The application of the vice-principal rule proved to be another problem in maintaining consistent employer's liability findings. Under the workers' compensation laws later passed in Indiana, as discussed in Chapter 4, the vice-principal exception would soon become extinct.

Contributory Negligence

The contributory negligence defense provided another means for employers to avoid liability. Under this defense, an employer could allege contributory negligence if the injured employee was at fault in any way. Once the employer

alleged the worker was even partially at fault, the burden of proof fell on the worker to show that he was not negligent.[176] Workers were often partially at fault because of the circumstances of their jobs or the use of the tools provided them, and employers often succeeded with this defense regardless of unsafe working conditions. Proving the absence of their own negligence was expensive and therefore difficult, and workers attempting this strategy were often forced to promise some of the potential settlement to their attorneys. If the workers were unable to prove that they were not negligent, the employers' contributory negligence defense served as a complete bar to recovery.

Between 1884 and 1915, the Indiana Supreme Court decided eighty cases where an employer alleged an employee was also negligent as a defense to the employee's general negligence allegation against the employer. Of those cases forty-six (58%) were decided in favor of the worker-plaintiff and thirty-four (42%) decided for the defendant railroad.[177] Unlike the fellow-servant defense, which the railroads used successfully, the Court was less willing to rule in favor of the railroad company based on the contributory negligence defense. More often than not, the plaintiff recovered in these cases.

Like the fellow-servant defense, the contributory negligence defense was

---

[176]Thomas Cooley, *A Treatise on the Law of Torts* (Chicago: Callahan and Company, 1906), 1457.

[177]See Appendix B.

often raised in combination with other defenses. Generally, the Court was reluctant to decide cases based on allegations of contributory negligence and instead based its decision on either the fellow-servant defense or the assumption of risk defense. Of the eighty cases where the contributory negligence defense was used (often along with other defenses), only twenty-two were decided solely on the basis of contributory negligence. Of course, the defenses of assumption of risk and contributory negligence were often based on the same facts, and the Court seems to have preferred finding that a worker assumed the risks of employment than to hold him (contributorily) negligent for continuing work despite an unsafe condition.

In only nine cases was the Court willing to find for the railroad company based solely on the contributory negligence defense. These cases often involved an employee being provided with a safe work environment, yet choosing to do something unsafe. In the industrial era when workers were often paid by the amount of work they could complete (e.g., number of cars coupled, length of tracks laid, etc.), there were incentives to use the quickest means to finish a task. The Court consistently held employees contributorily negligent if they were provided with a safe work environment and chose to use unsafe means to complete a job.

For example, in *The Cincinnati, Indianapolis, St. Louis and Chicago Railway Company v. Long*, the Court ruled that employees must act prudently with

respect to their own safety; failure to do so was considered contributory negligence.[178] In *Long*, the injured plaintiff was an experienced switchman who was hit by another train that was backing up. The Court found him contributorily negligent because, it reasoned, he could have seen the train coming and averted the accident. Similarly, in *The Pennsylvania Company v. O'Shaughnessy, Admin.* the Court held that a brakeman who took an unsafe path to the switchyard, when a safer but longer path existed, was contributorily negligent and was therefore barred from recovery.[179]

An employee's failure to follow accepted safety procedures almost always led to a victory for the defendant railroad company. In *The Pennsylvania Company v. Finney, Admin.,* the Court found a brakeman was contributorily negligent and barred from recovery when he descended from a ladder facing the train car rather than facing outward to take notice of any obstacles.[180] The Court held that the plaintiff's injuries would not have occurred if he had taken notice of his surroundings, and he could not now claim that the master was negligent. In *The New York, Chicago and St. Louis Railroad Company v. Hamlin*, the Court held that a railroad switchman injured when his pant leg caught on a bolt sticking

---

[178]*The Cincinnati, Indianapolis, St. Louis and Chicago Railway Company v. Long*, 112 Ind. 166 (1887).

[179]*The Pennsylvania Company v. O'Shaughnessy, Admin.,* 122 Ind. 588 (1890).

[180]*The Pennsylvania Company v. Finney, Admin.,* 145 Ind. 551 (1896).

out of the car he was to couple was contributorily negligent because he could have noticed this defect had he looked before attempting to couple the cars.[181] The Court further declared that the plaintiff could have attempted to couple the cars in another safer, but more time-consuming way, which would have avoided the accident.

The Court was also willing to require injured plaintiffs to take notice of their surroundings and held failure to do so a bar to recovery because they were found to be contributorily negligent. In *O'Neal v. The Chicago and Indiana Railway Company*, a young and inexperienced brakeman was thrown from a train because of the unevenness in the rails.[182] The Court held that, because the plaintiff had taken this same train before, and because the unevenness was open and obvious, the plaintiff was required to exercise due care to avoid injuries. Failure to exercise this due care made the plaintiff contributorily negligent. In one of the more egregious cases where the contributory negligence defense was allowed, *The New York, Chicago and St. Louis Railroad Company v. Ostman, Admin.*, the plaintiff, a fireman, was looking out the window, as was his duty, hit his head on a pole, and died.[183] The Court held that the plaintiff should have known of this

---

[181] *The New York, Chicago and St. Louis Railroad Company v. Hamlin,* 170 Ind. 20 (1907).

[182] *O'Neal v. The Chicago and Indiana Railway Company,* 132 Ind. 110 (1892).

[183] *The New York, Chicago and St. Louis Railroad Company v. Ostman, Admin.*, 146 Ind. 452 (1896).

danger and taken measures to avoid it because others had been killed this same way. The railroad company admitted it was a frequent occurrence and was able to evade liability.

In contrast, the contributory negligence defense was unsuccessful in thirteen cases, and the railroad was therefore liable. Many of these cases arose when an employee was provided with defective tools. For example, in *The Cincinnati, Indianapolis, St. Louis and Chicago Railway Company v. Roesch,* a track laborer was injured while raising the level of the track with gravel and tools provided by the railroad.[184] Here, the Court ruled that the employee could not be deemed contributorily negligent for continuing to work with a defective apparatus when it was the railroad's responsibility to provide suitable tools.

This reasoning remained fairly consistent. As late as 1913, in *Chicago and Erie Railroad Company et al., v. Dinius,* the Court declared that a railroad worker was not contributorily negligent when he fell into a hole and was hit by a train.[185] The railroad alleged that because the hole was visible, the worker was negligent in stepping into it, but the Court did not agree, finding instead that the railroad had to provide a safe work environment.

---

[184]*The Cincinnati, Indianapolis, St. Louis and Chicago Railway Company v. Roesch*, 126 Ind. 445 (1891).

[185]*Chicago and Erie Railroad Company et al., v. Dinius*, 180 Ind. 596 (1913).

In other cases where the Court found for the plaintiff, its reasoning was often based on the fact that the injured plaintiff was unaware of the unsafe working conditions. For example, in *The Lake Erie and Western Railroad Company v. Mugg, Admin.,* the plaintiff was injured by a defective rail while coupling cars.[186] Although the defendant railroad company alleged that the plaintiff was at fault because he continued to work despite this defect, the Court held the plaintiff was unaware of it and would not have discovered it through normal inspection. Therefore, the employee could not be contributorily negligent. Similarly, in *The Terre Haute and Indianapolis Railroad Company v. Fowler, Admin.,* the plaintiff was operating a train after a storm, which had washed out some of the train tracks, causing the train to derail and injure the plaintiff.[187] The Court maintained that the defendant railroad company, knowing that the storm might have damaged the track, should have warned the plaintiff. Therefore the conductor could not be found contributorily negligent for continuing his duties.

In judging whether the injured plaintiff acted prudently in response to a dangerous or unsafe situation, the Court used a "reasonable man" standard. In *The Louisville and St. Louis Consolidated Railroad Company et al. v. Utz, Admin.*, the plaintiff brakeman was injured by jumping from one moving car to another when a

---

[186]*The Lake Erie and Western Railroad Company v. Mugg, Admin.,* 132 Ind. 168 (1892).

[187]*The Terre Haute and Indianapolis Railroad Company v. Fowler, Admin.*, 154 Ind. 682 (1900).

pin came loose.[188] The defendant railroad company argued that the plaintiff was contributorily negligent because he was walking on top of a train that was traveling at a high rate of speed. However, the plaintiff successfully showed that an experienced railroad brakeman would not have known if there was a danger, so he could not be held negligent. The Court agreed.

Regardless of a seeming favoritism for railroad workers, several cases point to problems with the standards of proof for establishing contributory negligence and their interpretation. For example, in 1886 *The Pittsburgh, Cincinnati and St. Louis Railway Company v. Adams* the Court decided that when a section hand who was asked to act as a brakeman fell and injured his leg causing a subsequent amputation, it was up to the injured plaintiff to prove that he was not contributorily negligent.[189] In *The Louisville, New Albany and Chicago Railway Company v. Sandford, Admin.*, the Court held that a baggage master injured when a bridge collapsed was contributorily negligent because he continued to work when he knew of the danger.[190]

Railroad lawyers alleged the contributory negligence defense with limited success. Defendant railroad companies won only when employees failed to follow

---

[188]*The Louisville and St. Louis Consolidated Railroad Company et al. v. Utz, Admin.*, 133 Ind. 265 (1892).

[189]*The Pittsburgh, Cincinnati and St. Louis Railway Company v. Adams*, 105 Ind. 151 (1886).

[190]*The Louisville, New Albany and Chicago Railway Company v. Sandford, Admin.*, 117 Ind. 265 (1899).

accepted safety procedures, failed to take notice of dangerous surroundings, continued to work despite known safety hazards, or chose to do their job in an unsafe manner when the employer provided a safe alternative. Injured plaintiffs, more often than not, recovered despite allegations of contributory negligence. Plaintiffs were most likely to recover when they were given defective tools, put to work in an unsafe environment, or were injured despite behaving as a reasonable man would.

Assumption of Risk

The assumption of the risk defense relieved employers from liability if they could show that the employees knew their field or job was dangerous but continued to work despite hazardous conditions. This defense was particularly popular with employers in dangerous industries. Employers could allege this defense by simply showing that a certain risk was inherent to their industry. For instance, a railroad company could allege that train derailment was a common risk of railroad work and that workers assumed any injuries resulting from derailment and therefore should not recover. More often than not, this defense worked to protect the very harm or danger causing the injury because it was so common. Assumption of the risk often proved to be such a strong defense that courts

relieved employers from compensating injured workers even when a violation of safety law by the employer had caused the accident.[191]

Between 1885 and 1915, fifty-one Indiana Supreme Court cases discussed the assumption of the risk defense. During this period, the Court found this defense applicable approximately one-half of the time. Of the fifty-one cases decided between 1885 and 1915, twenty-seven (53%) were decided for the worker and twenty-four (47%) for the railroad companies.[192]

Examining the most common fact patterns for the twenty-seven cases decided for the worker, the Court usually held for the plaintiff when he was injured by a danger unknown to him which he had no means to discover. In early cases, like *The Louisville, New Albany and Chicago Railway Company v. Frawley*, a railroad coupler was injured when his conductor ordered him to couple two cars that had mismatched hooks.[193] The Court stated that workers only assumed usual and ordinary risks, and this worker had no way to know or discover the irregular coupling hooks that caused his injury. Similarly, in *Indiana, Illinois and Iowa Railroad Company v. Bundy*, the Court held that a brakeman injured in the dark by

---

[191]Harry Weiss, "Employers' Liability and Workmen's Compensation," in John Rogers Commons et al., ed., *History of Labour in the United States* (New York: A.M. Kelley, 1966 [1935]), 566.

[192]See Appendix C.

[193]*The Louisville, New Albany and Chicago Railway Company v. Frawley,* 110 Ind. 18 (1886).

unboxed wires did not assume that risk.[194] Later cases followed this same trend. In *Grand Trunk Western Railway Company v. Poole,* a car coupler was injured when he fell into a hole, got stuck, and was injured by an oncoming train.[195] The Court found that the worker did not assume this risk because the defendant railroad company did not make this danger known to its workers.

Furthermore, when raising the assumption of risk defense defendant railroad companies were not likely to prevail if the injury was caused by a risk created by a master. In *Taylor v. The Evansville and Terre Haute Railroad Company,* a railroad mechanic was severely injured when the railroad's master mechanic dropped a heavy engine part.[196] The Court held that the injured employee did not assume this risk of injury because, while an employee assumed the risk incident to the service he provided, he did not assume the risk created by the fault of his master. The Court later made stronger statements against the idea that a worker could assume the risk of a master's error in *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Lightheiser.*[197] In this case the plaintiff was standing between two incoming cars when an engineer in control of one of the

---

[194]*Indiana, Illinois and Iowa Railroad Company v. Bundy*, 152 Ind. 590 (1899).

[195]*Grand Trunk Western Railway Company v. Poole*, 175 Ind. 567 (1910).

[196]*Taylor v. The Evansville and Terre Haute Railroad Company*, 121 Ind. 124 (1889).

[197]*Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Lightheiser*, 163 Ind. 247 (1906).

cars backed his car up without a lookout and hit the plaintiff. The Court discussed the assumption of the risk defense specifically for railroads, and found that railroad employees could not be found to assume the risk of fault on the part of signal of railway operations, including telegraph offices, switch yards, machine shops, round-houses, or the equipment.

Later cases reaffirmed the Court's ruling in *Lightheiser*. In *Evansville and Terre Haute Railroad Company v. Lipking, Admin.*, a railroad worker asked to couple cars was killed when the foreman allowed another train on the track.[198] The railroad company argued that the worker assumed the risk of injury when accepting a job to couple cars. However, the Court held that the injured worker should recover because he could not assume the risk that a foreman would fail to exercise ordinary caution.

If the defendant railroad company violated a legal duty, the Court was likely to rule in favor of the injured worker. Some legal duties were broadly construed by the Court, while other times the Court was reluctant to impose an expansive duty on the defendant railroad company. For instance, in *Indiana, Bloomington and Western Railway Company et al. v. Barnhart,* the Court found the railroad company liable for the plaintiff's injuries where a state law provided for a safe

---

[198] *Evansville and Terre Haute Railroad Company v. Lipking, Admin.*, 183 Ind. 572 (1915).

railroad crossing and the railroad company did not comply.[199] The Court generally held, as it did in *Barnhart*, that employees could not assume the risk of their employer's failure to follow the laws.

The Court came to a similar finding in *The Baltimore and Ohio Southwestern Railway Company v. Peterson, Admin. of the Estate of Peterson.*[200] Here, the Court held the railroad company liable for the worker's injuries when the defendant's train was running at a higher rate of speed within city limits than was allowed by the city's ordinance. Thirteen years after *Barnhart*, the Court confirmed that workers could not be found to assume a risk where their employer did not abide by city ordinances or codes. In *The Wabash Railroad Company v. Gretzinger, Admin.*, the Court held a worker did not assume the risk when he was killed in a switchyard by a train that exceeded the speed set by a city ordinance.[201] While specific trends discovered under both the fellow-servant defense and the contributory negligence defense seem inequitable toward workers, the Court more likely than not found for the injured worker if the employer did not obey the law.

While the assumption of risk cases discussed above illustrate a progressive Court, other cases show a conservative one. When there was a clear duty imposed

---

[199] *Indiana, Bloomington and Western Railway Company et al. v. Barnhart*, 115 Ind. 399 (1888).

[200] *The Baltimore and Ohio Southwestern Railway Company v. Peterson, Admin. of the Estate of Peterson,* 156 Ind. 364 (1901).

[201] *The Wabash Railroad Company v. Gretzinger, Admin.,* 182 Ind. 155 (1914).

on the railroad company to provide a safe workplace, it found for the plaintiff. The Court was more inclined to find in favor of the defendant railroad company if only a vague duty imposed.

Conversely, the Court also seemed to hold for the defendant when the plaintiff knew or reasonably could have known of the danger that caused his injury, but continued to work despite this knowledge. For example, in *The Indianapolis and St. Louis Railway Company v. Watson*, a train yard night watchman was injured when he entered the train yard but was not given a lantern by his employer so that he could see dangerous obstacles.[202] The Court found that the worker assumed the risk of injury when he continued to work, knowing he did not have a lantern. The Court refused to rule that the railroad had a duty to provide the worker with a lantern, the most basic of safety tools for a night watchman.

More egregious than *Watson*, in *Hollingsworth, Admin., v. The Chicago, Indianapolis & Louisville Railway Company*, a brakeman, who rode on the top of the train to operate the brake, died from hitting his head on a low bridge without working warning signals.[203] Introducing evidence of other workers who were injured in this same manner showed that the plaintiff was aware of the situation and nevertheless continued to work. Cases like *Hollingsworth* demonstrate that

---

[202]*The Indianapolis and St. Louis Railway Company v. Watson*, 114 Ind. 20 (1887).

[203]*Hollingsworth, Admin. v. The Chicago, Indianapolis & Louisville Railway Company*, 160 Ind. 259 (1902).

the railroads refused to remedy dangerous conditions that repeatedly injured their workers and got away with it.

Subsequent cases show the same reluctance by the Court to hold railroad companies to high safety standards. In *Cleveland, Cincinnati, Chicago and St. Louis Railway Company v. Morrey, Admin.,* a plaintiff brakeman injured in a dark switchyard was denied recovery.[204] The Court held that there was no legal duty to have the switchyard lit and that the brakeman had assumed the risk of working in the dark.

In addition, the Court was less likely to find for the injured plaintiff if the worker was injured during the regular course of business or injured by what the Court deemed to be ordinary risks of employment. The Court generally held for the railroad companies where injuries were the result of open and obvious dangers, rarely requiring the railroad companies to take responsibility. In many cases, the Court only required the defendant railroad company to show that the employee, exercising ordinary care, could have discovered the danger and not that the injured plaintiff had actual knowledge of it. In *The Louisville and Nashville Railroad Company v. Kemper*, a railroad worker moving a train along the track slipped and

---

[204] *Cleveland, Cincinnati, Chicago and St. Louis Railway Company v. Morrey, Admin.,* 172 Ind. 513 (1909).

caught his foot on a damaged portion of the track.[205] The Court held that the worker assumed the risk because the condition of the track was open and visible.

Later cases show a similar tendency of the Court to find in favor of the defendant railroad company, despite dangerous working conditions, if the plaintiff knew of them. In *Southern Railway Company et al. v. Howerton*, a railroad worker, working at a new location, was injured by an explosion near the track.[206] The Court held that the employee could have discovered the presence of the explosives had he investigated his surroundings, and because he did not, he assumed the risk that something would go wrong. The Court denied recovery for his injuries.

Finally, in a few cases, the assumption of the risk defense seemed intertwined with the other defenses. Railroad companies often used more than one defense in response to a plaintiff's charge of negligence. Railroad companies also claimed the plaintiff could not recover because the employee causing the injury was a fellow servant and, in the alternative, that the plaintiff assumed the risk that the fellow servant might be negligent. These strategies often proved difficult for plaintiffs to overcome. In *Southern Indiana Railway Company v. Harrell*, a railroad worker was injured by the negligence of his foreman.[207] The Court denied

---

[205]*The Louisville and Nashville Railroad Company v. Kemper*, 147 Ind. 561 (1897).

[206]*Southern Railway Company et al. v. Howerton*, 182 Ind. 208 (1914).

[207]*Southern Indiana Railway Company v. Harrell*, 161 Ind. 689 (1903).

recovery, finding not only that the foreman was a fellow servant to the injured plaintiff, but also that the injured plaintiff had assumed the risk that his fellow servant would act negligently. The only way an employee could overcome this ruling was to show negligence in hiring or selecting those negligent employees, which was quite difficult, time consuming, and expensive.

Railroad lawyers alleged the assumption of risk defense with moderate success between 1880 and 1915 with almost half of the allegations bringing a favorable judgment. Defendant railroad companies won most often when plaintiffs knew of a risk (or could have known of a the risk through ordinary inspection) and continued work or when the injury occurred in the regular course of employment. Injured plaintiffs recovered a little over half of the time when a defendant alleged the assumption of risk defense. Plaintiffs were most likely to recover when their injury was caused by the master, if the railroad company did not comply with accepted safety standards, or if the worker had no knowledge of the danger inherent in his tasks.

In eighty-three cases between 1880 and 1915, the railroads alleged the fellow-servant defense. The Court became more likely to decide for injured workers as the period progressed, finding for workers overall almost 60 percent of the time. Despite this proportion, employees could reasonably count on winning only when the injury resulted from a special fact pattern, for example, when the employee was injured by a fellow servant given poor tools by the master, or the

fellow servant clearly violated a safety ordinance. Other cases depended largely upon the plaintiff's individual circumstance, making consistent case law impossible to identify. Injured employees suing their employers experienced frustration in gauging their claims because the case law was so unclear. The Court also carved out an exception to the fellow-servant defense by which employees could hold their masters liable if the harms leading to their injuries were done by a vice principal (e.g., a supervisor or foreman). While the rationale behind this rule was to ameliorate the rule's harsh effects, the railroad companies won 66 percent of these claims when looking at the fellow-servant defense alone.

Used slightly less often than the fellow-servant defense was the contributory negligence defense, alleged in eighty cases between 1880 and 1915. Like the fellow-servant defense, the Court failed to develop a coherent body of case law, finding for the injured plaintiff only 58 percent of the time. Generally, railroad lawyers successfully used this defense only when employees failed to follow accepted safety procedures, failed to take notice of dangerous surroundings, continued to work despite known safety hazards, or chose to do their job in an unsafe manner, even though the employer provided a safe alternative. Alternatively, injured plaintiffs could count on consistent victories only when they could prove the master gave them defective tools, put them to work in an unsafe environment, or that they were injured, despite their reasonable precautions.

Because most cases did not fall within these strict fact patterns, injured employees could not realistically measure the potential success of their claims.

The assumption of risk defense was used less than the fellow-servant or contributory negligence defenses, appearing in fifty-one cases during the period studied. Similar to the other defenses, injured plaintiffs were only moderately successful overcoming this defense, succeeding only 53 percent of the time. Like the contributory negligence defense, employees could not estimate their chances of recovery, outside of a few specific fact patterns. Plaintiffs were most likely to recover when the master caused the plaintiff's injury, the plaintiff had no knowledge of the danger, or if the railroad did not comply with accepted safety regulations. On the other hand, railroad companies were victorious when plaintiffs continued work despite known dangers, or when the injury occurred in the regular course of employment.

Looking at all three defenses together, the cases analyzed demonstrate the need for workers' compensation legislation. Despite a firm common law tradition, parties were unable to predict the outcome of potential litigation, leaving many injured workers without compensation. Between 1880 and 1915 injured employees succeeded more often than not at the highest state court level yet employers still managed to win a considerable number of cases. This analysis provides a context for Chapter 4, which examines the development of Indiana's workers' compensation legislation.

In Indiana, the trinity of defenses (fellow-servant, contributory negligence, and assumption of risk) denied many railroad employees compensation for their work-related injuries. The success of the defenses also allowed railroads to maintain deplorable working conditions and shoddy safety standards. Discouraged from bringing suit, injured employees often accepted reduced settlements. The Courts did not create a consistent body of case law to manage workplace injuries so reformers and other interested parties went to the legislature for a solution.

CHAPTER 4

THE INDIANA WORKMEN'S COMPENSATION LAW

Prior to the passage of worker's compensation legislation in Indiana, a member of the Indiana Commission to Study Workmen's Compensation reported that one in twenty railroad workers were injured in Indiana each year.[208] Still, the railroads refused to correct dangerous working conditions. The courts also failed to remedy many workers' injuries by accepting common law defenses that barred their recovery, including assumption of risk, the fellow-servant rule, and contributory negligence. Furthermore, adjudicating workplace injury lawsuits in the court system discouraged many potential plaintiffs from suing their employers because of the cost and the delay in receiving any benefits. Most injured railroad workers were wage laborers with little savings. Hiring an attorney to file a claim against their employer meant spending money on a case that might prove fruitless or, at best, promising a portion of their possible winnings as a contingency fee for their lawyer.

The Indiana judicial branch proved unable to solve the problems created by industrialization and unsafe working conditions. As illustrated in Chapter 3, the

---

[208]Henry W. Bullock, "Workmen's Compensation" (paper presented at the Indiana Bar Association, Indianapolis, Indiana, July 10, 1913), Indiana State Library, Indianapolis, 2.

outcome of lawsuits depended a great deal on the individual circumstances of each case, making it difficult for injured plaintiffs to be certain of recovery. Because recovery was uncertain and costly to pursue, injured workers remained a concern during the first few decades of the twentieth century. Progressive reformers continued to push for change. This chapter examines Indiana's struggle for a legislative solution, looking at early employers' liability laws, interest groups that supported comprehensive workers' compensation legislation, and the success of Indiana's 1915 Workmen's Compensation Act.

Indiana legislators noticed even before the turn of the century, that the common law employers' liability defenses (i.e., fellow-servant, contributory negligence, and assumption of risk) blocked most workers from collecting reasonable damages for workplace injuries. They attempted to remedy the situation. Prior to the passage of the 1915 Workmen's Compensation Act, the Indiana General Assembly enacted a few weaker statutes altering the common law of employers' liability. While these acts did not curb the use of the three employers' liability defenses, they did lay the groundwork for comprehensive workers' compensation legislation.

The first of these acts was passed in 1893. Until then, injured employees relied exclusively on the common law of negligence, rather than the violation of a specific statute, for recovery. On March 4, 1893, the Indiana General Assembly approved the first employers' liability statute in Indiana. The language of this

statute specifically applied to railroads: "regulating liability of railroads and other corporations, except municipal, for personal injury to persons employed by them."[209] While this act applied to manufacturers, coal mines, factories, etc., the General Assembly specifically included railroads.

The 1893 act established four skeletal fact patterns where employers would be held liable for employee injuries assuming those employees were exercising due care and diligence. First, employers were liable when defective work conditions, tools, or machinery caused injury, provided that those conditions were the result of negligence on the part of the employer. Second, employees could recover if their injuries resulted from the negligence of a superior employee. Third, the statute applied when the worker was hurt by an act or omission of another employee provided that the employee was acting under instructions of his supervisor or under any rule, regulation, or by-law of the company. Finally, employers were responsible when the injury was caused by the negligence of another employee who was in charge of a "signal, telegraph office, switch yard, shop, round-house, locomotive engine, or train upon a railway."[210]

The act also stated that injured employees could not collect if they knew their job was dangerous or if the fellow servant who caused their accident was

---

[209]*Laws of the State of Indiana, 1893* (Indianapolis, 1893), chap. 130, sec. 1, 294.

[210]Ibid., 294-95.

incompetent, or if they could have discovered this incompetence.[211] The legislature maintained that damages should be commensurate with injuries.[212] The final section declared that contracts in which employees waived their right to sue were held void.

Only small changes were made to the 1893 act prior to 1915. In 1899, the General Assembly made the contributory negligence defense harder for employers to prove. The 1899 act stated that plaintiffs were no longer required to prove the negligence of the employee to avoid liability.[213] In 1911 the General Assembly again made changes to the existing laws. The 1911 act restated much of the 1893 legislation and placed a greater burden of proof upon defendants, further whittling away at the common law defenses. Specifically, this act mandated that employers could not succeed on an assumption of risk defense if an employer or the employer's agent breached a duty, violated an ordinance or a statue, or provided unsafe tools.[214] The 1911 Act also provided some limitations on injured employees' recovery, maintaining that employers could not be held liable for more than $10,000 and setting forth a two-year statute of limitations.[215]

---

[211]Ibid., 295.

[212]Ibid.

[213]*Laws of the State of Indiana, 1899* (Indianapolis, 1899), chap. 41, sec. 1, 58.

[214]*Laws of the State of Indiana, 1911* (Indianapolis, 1911), chap. 88, secs. 1-12, 145-48.

[215]Ibid., 148.

Despite continued legislative attempts to modify employers' liability, problems remained. As the case charts in the Appendix and the discussion in Chapter 3 demonstrate, the 1893 Employer's Liability Act and the subsequent changes thereto, provided injured workers little predictability or consistent recovery.

Several groups, including attorneys, insurance companies, and organized labor, noticed that legislation had failed to solve the problem. These groups began to take an active interest in developing new and comprehensive workers' legislation. The development of compulsory legislation was a concerted effort between those groups representing workers and businessmen or employers, as well as other interested parties, such as attorneys and insurance companies.

Attorneys represented the interests of their clients, and not all attorneys agreed on the value of workers' compensation legislation. Personal injury attorneys as well as insurance defense attorneys relied on the income from workplace accident litigation. As attorneys represent the interests of their clients, not all attorneys agreed on their desires for compensation legislation. The former favored eliminating or weakening the employer's defenses so plaintiffs would have a greater chance at success, while the latter and railroad attorneys favored strengthening those defenses to protect their client's interests.

At the 1911 meeting of the Indiana Bar Association, members requested that the association's Committee on Jurisprudence and Law Reform,[216] along with a newly created Bar Association Special Legislative Committee,[217] investigate and recommend possible compensation legislation. While neither committee had the power to propose this legislation to the Indiana General Assembly, the State Bar Association lobbied members of the Assembly as well as boasted several members who served in the General Assembly. Their suggestions, while not formal bills, represent the opinions of the Indiana lawyers and arguably influenced the eventual workers' compensation scheme.

The Committee on Jurisprudence and Law Reform suggested no major changes in the law as it existed in 1911, but proposed model legislation which provided for accident insurance. Their proposal suggested that: (1) employers and employees be permitted to agree upon compensation prior to accidents or injuries received during the course of employment, provided that compensation in case of death did not fall below a minimum state-established threshold; (2) employers be permitted to obtain insurance to cover such claims; and (3) the legislature be

---

[216] The members included John T. Dye, Dan W. Sims, Charles S. Baker, Marcellus A. Chipman, and Samuel Parker. Indiana Bar Association, "Employers' Liability: Reports of Committee on Jurisprudence and Law Reform, and of the Special Legislative Committee" (paper presented at the Indiana Bar Association, Indianapolis, July 11, 1911), Indiana State Library, Indianapolis, 3.

[217] The five members of the committee were Addison C. Harris, John T. Dye, Evan B. Stotsenburg, John T. Rupe, and Joseph N. Rabb. Ibid., 2.

required to create an Industrial Commission to carry out the provisions of any new acts.[218] However, this suggestion did not statutorily dispose of the employers' common law defenses, stating simply that "insurance shall embrace and cover all injuries received by the employe [sic] in the course of employment, whether caused by negligence or not; except such injuries as are the result of willful acts of the employe [sic] with the intention of causing the injury, or in disobedience of the orders or rules of the company, of which the employe [sic] has been duly notified."[219]

Furthermore, the proposal safeguarded the interest of plaintiff's lawyers. It maintained a provision that either party could submit the matter to the county court and that court would have exclusive jurisdiction, saving the appeals process if the insured did not agree with the finding of liability or the recovery decided by the Industrial Board.[220] The statute also gave a court the power to give attoney's fees to the winning party, thus encouraging plaintiffs to appeal the decision of the Industrial Board.[221]

In its report to the Bar Association, the Special Legislative Committee discussed constitutional blocks to a state mandated workers' compensation scheme, some of which other states had faced in attempting to pass their own

---

[218]Ibid., 3-12.
[219]Ibid., 5.
[220]Ibid., 11-12.
[221]Ibid., 12.

workers' compensation legislation.[222] First, the committee reminded the Bar Association that the U.S. Bill of Rights enumerated the right to a jury trial.[223] Legislation that required either an employer or employee to pay or accept compensation based upon statute without a jury trial might violate the United States Constitution. Second, under the Fourteenth Amendment to the U.S. Constitution, no person could be deprived of property without due process of law. An employer could not be made to pay compensation against his consent without first having the right to due process.[224] A final legal (but not constitutional) stumbling block was the idea of forced payment without an acknowledgement of fault, which went against established legal precedent and attitude of the day.[225] Therefore, the committee recommended that the employer and employee be given

---

[222]See *Ives v. South Buffalo Ry. Co.*, where the New York Court of Appeals held a compulsory worker's compensation act unconstitutional. 94 N.E. 431 (1908).

[223]The Seventh Amendment to the United States Constitution reads in pertinent part: "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The Fifth Amendment to the United States Constitution provides a right to a jury trial in criminal cases only.

[224]The Fourteenth Amendment to the United States Constitution reads in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Reformers argued that workers' compensation would deprive the business owner of property (money paid to an injured worker) without a finding of fault or due process of law.

[225]Indiana Bar Association, "Employers' Liability," 1-2.

the opportunity to decide whether to participate in the system (thereby waiving their fundamental rights) or not participate.[226]

The committee also recommended sample legislation much more limited in scope than the earlier bills. It suggested that compensation legislation include only manual and mechanical laborers whose work was extra-hazardous and dangerous, like employees working on or with railroads, gunpowder, demolition, elevators, scaffolding, mines, tunnels, as well as all workplaces using steam, electricity, or other mechanical power.[227] The committee suggested the implementation of payment schedules and provisions for taking care of widows and dependant children. It also recommended that employers be given the right to require injured employees making a claim to submit to a medical examination to determine the extent of their injuries. Finally, like the other Bar Association committee, this group suggested a provision to protect the interest of lawyers, stating that disputes which could not be settled either by agreement of the parties or submission to a labor arbitration board, could be brought to court. Damages would, of course, include attorney's fees, or in the alternative, a contingency fee of up to 25 percent of the judgment.[228]

---

[226]Ibid., 14.
[227]Ibid., 16-17.
[228]Ibid., 26-27.

While the Indiana General Assembly did not pass legislation substantially similar to either committee's recommendations, the proposals of the Indiana Bar Association shed light upon the struggle surrounding workers' compensation and offer insight as to the temper of the Indiana legal community.

The State Bar Association was not the only interest group discussing change to employers' liability law. Other organizations and groups also lobbied to ensure their interests were represented in any workers' compensation legislation. Insurance companies offering industrial insurance[229] supported the passage of compulsory workers' compensation legislation.[230] Prior to the passage of obligatory statutes, insurance companies sold their products directly to industrial corporations or individuals. But industrial corporations were unlikely to purchase insurance plans because the expense cut into their profit margin. Alternatively, if the corporations elected to pass the cost along to the workers by reducing wages, they would cease to offer competitive pay. Individuals were rarely able to

---

[229]Industrial insurance included life insurance, what we would today term disability insurance, burial insurance, or medical insurance to pay for injuries. Employees could carry one of these policies or more than one.

[230]Charles Richmond Henderson, *Industrial Insurance in the United States* (Chicago: University of Chicago Press, 1909), 162-67.

purchase comprehensive policies because they were too expensive.[231] For these reasons, few people carried industrial insurance policies.

A compulsory workers' compensation law, forcing all employers to maintain accident insurance, would mean a captive and lucrative market for insurance companies. Still, most insurance companies lobbied for a national workers' compensation plan. Individual states had been reluctant to be the first to pass compulsory workers' compensation insurance laws "since the manufacturers and traders of each state [were] in competition with those of all other states."[232] Insurance companies could also decrease their sales force by selling and maintaining plans of larger companies rather than individual employees.

Workers also supported comprehensive compensation legislation, yet individual workers lacked the power available to the Indiana Bar Association or the insurance lobby. Workers did, however, increase their power by joining unions. Union support for workers' compensation legislation was not strong in the early twentieth century but quickly gained momentum nationally.[233] Earlier attempts at comprehensive workers' insurance were generally met with resistance

---

[231]Studies from several states done in 1901 show that most families of industrial laborers lived with a "narrow margin between income and subsistence." It took only "a few weeks of sickness or incapacity through accidents, and the major reserve is consumed, and the family faces want and dependence on charity; for little savings and feeble credit on honor or pawn will not go far." Henderson, *Industrial Insurance*, 46-47.

[232]Ibid., 59.

[233]Ibid., 61.

as unions viewed these efforts as "attempts to compel the workmen to pay an excessive share of the premiums, to break the power of the union and alienate its members."[234]

By the turn of the century, Indiana was one of the stronger union states, and workers had campaigned and obtained improvements primarily due to strong skilled trade unions.[235] However the power of Indiana's unions dwindled during the first two decades of the twentieth century, as employers and businessmen began an antiunion campaign which lessened the power of the union lobby.[236] Union members and those representing their interests opposed earlier attempts at limiting employers' liability because early proposals modified the common law defenses (i.e., fellow-servant, contributory negligence, and assumption of risk) rather than changing the system.[237]

Business and labor alike saw the need for workers' compensation legislation. The previous employers' liability acts failed to provide consistent and fair relief. Other states, as well as other countries, faced similar dilemmas as the industrial workplace became more dangerous and more workers were injured.

---

[234]Ibid.

[235]James H. Madison, *The Indiana Way: A State History* (Indianapolis: Indiana University Press, 1986), 166. For more information on Indiana's unions, see Clifton J. Phillips, *Indiana in Transition: The Emergence of an Industrial Commonwealth* (Indianapolis: Indiana Historical Bureau and Indiana Historical Society, 1968), 323-60.

[236]Madison, *The Indiana Way,* 166.

[237]Indiana Bar Association, "Employers' Liability," 14.

Some states and nations had already passed workers' compensation legislation. With this growing problem on many different agendas, the Indiana General Assembly on March 15, 1913, responded by creating a commission to investigate the state's need for workers' compensation legislation. The same year, the General Assembly addressed other progressive reforms like a state inheritance tax, the creation of a public utilities commission, and a broad primary election law.[238]

The Indiana Workmen's Compensation Commission was designed to examine the "comparative efficiency, cost, justice, merits and defects of the laws of other industrial states and countries."[239] The legislature directed the governor to appoint five commissioners, one of whom was required to be an employer of labor and at least one who had to be an industrial laborer. Governor Samuel Ralston appointed Henry W. Bullock, an Indianapolis attorney, as chairman; William Greene, a union member from Indianapolis; John E. Frederick, a Kokomo steel executive; Alfred M. Ogle, a Terre Haute coal executive; and Charles Fox, a union member from Terre Haute, to the commission.[240] The General Assembly and Ralston hoped to develop a workers' compensation bill that would represent the interests of both union members and business executives.

---

[238]Phillips, *Indiana in Transition,* 120.
[239]*Laws of the State of Indiana, 1913* (Indianapolis, 1913), 897.
[240]Bullock, "Workmen's Compensation," i.

In addition to their study of legislation from other states and countries, the Workmen's Compensation Commission met with labor and employer representatives, and studied several types of compensation systems. Chairman Bullock described that the commission's initial report stated that both employers and employees were eager to adopt a fair compensation law.[241] He reported that the commission favored state-sponsored insurance plans coupled with a state board, rather than allowing private insurers or employers to distribute compensation, fearing adjusters interested in profits would not be impartial in the settlement of claims. He stated that the state board was necessary to prevent an adjuster telling an injured worker, "[t]ake this small amount in full settlement or quit your job."[242] The commission recommended that a single state body be in charge of workplace inspections, as well as gathering labor statistics and managing compensation review. However, he acknowledged that industrial and insurance lobbies had defeated previous attempts in Indiana to create such a body.[243] Instead Bullock and his fellow commissioners supported a law similar to those in New York, West Virginia, Ohio, California, Washington, and Oregon, where all

---

[241]Ibid., 1-4. The first report of the Indiana Workmen's Compensation Commission apparently no longer exists. The report could not be found with other materials cited herein at the Indiana State Library, the Indiana State Archives, the Indiana Historical Society, or the current state agency that oversees modern workers' compensation claims. Bullock's report is used as a substitute since he presented the commission's findings.

[242]Ibid., 2.

[243]Phillips, *Indiana in Transition,* 336-337.

adjustments were made by a state compensation board and employers could choose to take part in a state-sponsored fund or maintain private insurance. However, the commission knew that excluding the option for private insurance would alienate the powerful insurance lobby and lessen the bill's viability.

The commission also argued that worker's compensation legislation was needed because insurance companies and attorneys were collecting nearly half of all the amounts employers paid to insure against workplace accidents. The commission believed that most of these monies should be paid to injured workers. On behalf of the commission, Bullock stated that "employers pay a dollar to insurance companies to every fifty cents that the workmen receive, and then innumerable swarms of ambulance-chasing adjusters and lawyers have come forth to fleece the workmen by soliciting their cases."[244] The solution was workers' compensation legislation.

Bullock gave a speech regarding the commission's findings to the Indiana Bar Association in July, 1913.[245] His recommendations differed from the 1911 Bar Association's Committee Reports discussed above. He asked for the Bar Association's assistance in securing workers' compensation legislation. The commission needed the association's support because so many members of the Indiana Bar were either legislators or made a significant part of their living

---

[244]Bullock, "Workmen's Compensation," 3.
[245]Ibid.

litigating or defending personal injury cases arising from workplace injury. Bullock's address, as the chairman of the Workmen's Compensation Commission, to the Indiana Bar Association stands as one of the few documented reports from the commission and sheds a great deal of light upon their findings and recommendations which eventually became the basis for the 1915 Workmen's Compensation Act.

According to Bullock's speech, the commission put forth several reasons why Indiana should move to a bureaucratic compensation system based upon social and economic conditions rather than continue to adjudicate individuals' cases under a liability system based on fault. First, the commission argued that only a small number of workers received substantial compensation, which lowered the standard of living for those uncompensated. Second, the commission believed the current system wasted resources because Indiana had to maintain courts that were flooded with employer's liability claims. Third, plaintiffs awarded compensation sacrificed a portion, sometimes a very large portion, to their attorneys. Fourth, the commission maintained that the current system was slow to bring relief to the injured plaintiffs who were forced into lengthy settlement negotiations or crowded court dockets when most of them needed immediate relief. Fifth, the liability system based on fault bred antagonism between employer and employee. Finally, the commission reasoned that the fault-based system placed the burden of suffering upon the injured worker and upon the society that

had to care for him, rather than dividing the burden between employee and employer.[246]

Bullock explained that the commission also shared the concerns of the Bar Association that a compulsory workers' compensation law might not pass constitutional muster. Bullock, speaking on behalf of the commission, argued that "[p]rivate wrongs or torts are personal; but the injuries occurring from the inherent hazards of industry are not personal, and should be charged against the industry as a whole, and not against the individual employer."[247] The commission wanted the Bar Association's members to view workers' compensation laws as guarding against injury to an industry, rather than as penalizing individual employers who would be forced to pay without the opportunity for a trial.

Bullock also pointed out that the legislature was free to modify the legal concepts of the fellow-servant rule, assumption of risk, and contributory negligence. He illustrated the various ways other states had used their police power to allocate resources.[248] Bullock explained that the Workmen's Compensation Commission attempted to secure support for their findings by eliminating constitutional concerns by characterizing their recommendations as social insurance rather than a penalty for business owners. Finally, Bullock

---

[246]Ibid.
[247]Ibid., 4.
[248]Ibid.

suggested that the cost of caring for injured workers could be tacked on to the cost of production and passed along to the consumer.[249]

The commission had met and made its recommendations, a summary of which are in Bullock's speech to the Indiana Bar Association, in 1913 and hoped to make progress at the next General Assembly session in 1915. After speeches like the one Bullock gave to the Indiana Bar Association, as well as similar speeches to union leaders and business executives, the time for workers' compensation legislation had arrived.

Bringing the commission's findings to fruition, Representative William H. Sare proposed a workers' compensation bill on January 26, 1915.[250] In only two months the measure moved quickly through both the Indiana House and Senate with little opposition. Governor Samuel M. Ralston signed the bill into law on March 8, 1915, and the act took effect on September 1, 1915.[251] The relative ease and speed with which the workers' compensation bill progressed through the General Assembly demonstrates the growing support for such legislation.

The Workmen's Compensation Act of 1915 created an Industrial Board of three full-time members appointed by the governor to oversee and enforce the

---

[249]Ibid., 6.

[250]*Indiana House Journal, 1915* (Indianapolis: WM. B. Burford, 1915), 236.

[251]Ibid., 1641.

act.[252] The Industrial Board absorbed the powers and duties of the State Bureau of Inspection, which included the inspection of buildings, factories, workshops, boilers, and mines, along with the powers and duties of the Labor Commission.[253] The Industrial Board was granted the power to make rules to enforce the 1915 act.[254] It could "subpoena witnesses, administer or cause to have administered oaths, and to examine or cause to have examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute."[255] The board was also responsible for collecting information for accident reports.[256]

The structure of the 1915 act reflected the Commission's findings and recommendations. The 1915 act stated that all employees and employers, other than those involved in interstate commerce (i.e., transporting goods and services across state lines), were included, unless either the employee or the employer opted out more than thirty days before an accident.[257] The 1915 act also provided that notice of opting out of the legislation had to be in writing, posted conspicuously in the workplace, and filed with the Industrial Board. Procedures to opt out of the act

---

[252]*Laws of the State of Indiana, 1915* (Indianapolis, 1915), chap. 106, sec. 50, 406-7.

[253]Ibid., secs. 50-54, 407-8.

[254]Ibid., sec. 54, 408.

[255]Ibid., sec. 55.

[256]Ibid., sec. 56, 409.

[257]Ibid., secs. 2-3, 19, 392, 396. Interstate commerce is governed by federal law, which falls outside the scope of this paper. For more information on federal railroad law, see James W. Ely, Jr., *Railroads and American Law* (Lawrence: University Press of Kansas, 2001).

were closely monitored so that employers did not pressure employees to give up the rights created by the new legislation. Furthermore, certain classes of employees (e.g., casual laborers, farm or agricultural laborers, and domestic employees) were excluded from the act's jurisdiction altogether.[258]

In Indiana workers' compensation was now the exclusive remedy: participating injured employees could no longer make common law claims of negligence against their employers.[259] If an employer (or the employer and employee in concert) elected not to participate in workers' compensation, the employer was denied the common law defenses of contributory negligence, the fellow-servant rule, or assumption of risk.[260] However, if the employee wished not to participate, the employer was then allowed to use the common law defenses.[261] The employee could take his chance if he desired, but he could not take advantage of the new legislation that did away with the employers' defenses.

The 1915 act contained additional provisions that protected employers. The legislature provided that self-inflicted injuries would not be compensated. Specifically, the 1915 act stated that employees would be denied recovery if "an injury or death [was] due to the employe's [sic] willful misconduct, including

---

[258]*Laws of the State of Indiana, 1915* (Indianapolis, 1915), chap. 106, sec. 11, 394-95.

[259]Ibid., sec. 6, 393.

[260]Ibid., secs. 10-12, 394-95.

[261]Ibid., sec. 11.

intentional self-inflicted injury, intoxication, and willful failure or refusal to use a safety appliance or perform a duty required by statute."[262] The legislature placed the burden of proving the employee's culpability firmly on the defendant employer.[263] In addition, if someone other than an employer caused the injury, the harmed employee could still collect under worker's compensation. The 1915 act created a right for employers to recover against third parties, like sub-contractors, if the employer could prove the third party was negligent.[264]

The 1915 act also laid out the requirements for maintaining insurance and reporting accidents. The legislature mandated that every employer falling under the purview of the statute must either hold workers' compensation insurance through a state-approved insurance company or maintain a financial reserve to pay compensation directly to injured employees.[265] The 1915 act further required that employers keep thorough records of all injuries and report these injuries to the Industrial Board in a timely manner.[266] Employers who refused to comply were subject to harsh financial penalties. Compulsory insurance as well as detailed report forms were a drastic deviation from pre-workers' compensation legislation. Employers gave up their autonomy for the reliability of fixed insurance costs.

---

[262]Ibid., sec. 8, 394.
[263]Ibid.
[264]Ibid., sec. 13-14, 395-96.
[265]Ibid., secs. 69-75, 413-15.
[266]Ibid., sec. 67, 412.

The 1915 act set strict payment parameters. Unlike the common law system, employees no longer negotiated their benefits. The act stated that the employer was responsible for the employee's medical bills resulting from the accident and expenses based upon the typical community standards for treating the employee's injury.[267] Furthermore, during the employee's resulting disability, the Industrial Board required the employee to submit to medical testing.[268] Prior to the 1915 act's passage, injured employees paid for any medical expenses, which they could include in claims against their employers, provided they could demonstrate negligence and overcome the employers' common law defenses. In reality, this requirement often meant that the injured went without proper medical care because of the cost. Securing immediate medical benefits for workplace injuries was a major victory for workers.

Despite immediate coverage of medical bills an injured employee could not collect lost wages or other compensation for the first fourteen calendar days of his disability.[269] Legislators likely included a two-week waiting period to respond to the concerns of many employers and business owners who felt that workers' compensation would encourage malingering. The two-week waiting period encouraged workers to return to work because few of them could afford to be

---

[267]Ibid., secs. 25-27, 398-99.
[268]Ibid., sec. 27, 399.
[269]Ibid., sec. 28, 399-400.

without pay. Malingering was further discouraged because employees received less under workers' compensation than they earned when working. Most wage laborers need to work and could not afford the waiting period because they held low paying jobs, had little opportunity to save, and could not support their families on partial pay, or their children and wives were forced to work if they were not already working.

The 1915 act also set forth payment schedules for those injured employees who could no longer work to their full capacity. An employee who was partially disabled by an accident was entitled to weekly compensation equal to one-half of the difference between his previous weekly wages and his weekly wages after his injury for no more than three hundred weeks.[270] This calculation meant that injured employees earned less than they did prior to their injury. If an employee refused to accept other suitable employment, he collected nothing.[271] An employee deemed totally disabled (meaning he could no longer work) was entitled to only 55 percent of his average weekly wage for up to five hundred weeks.[272] While those fixed amounts ensured some compensation, most wage laborers could not afford even a slight reduction in pay, let alone cutting their income in half.

---

[270]Ibid., sec. 30, 400, 404. The act also established that average weekly wages for any injured employee would be no more than twenty-four dollars and no less than ten dollars.

[271]Ibid., sec. 32, 401.

[272]Ibid., sec. 31, 400.

The 1915 act also determined the duration of compensation for each type of injury.[273] Employees who lost either a thumb or one or two fingers were given fifteen weeks of compensation at 55 percent of their weekly compensation, while more than two fingers yielded thirty weeks of compensation at 55 percent of their weekly compensation. A worker whose injury resulted in permanent and irrecoverable loss of sight earned one hundred weeks of compensation at 55 percent of their usual weekly pay, whereas complete loss of hearing meant partial pay for seventy-five weeks. An employee who lost a hand at or above the wrist was awarded 55 percent of his pay for one hundred and fifty weeks, while a leg at or above the knee joint provided one hundred and seventy-five weeks of partial compensation. All other cases of permanent partial disability were determined by the Industrial Board.[274] Dismemberments and permanent injuries also meant that employees' future employment would be limited, which almost always substantially reduced subsequent earnings.

The 1915 act also made provisions for dependents of deceased workers. Upon the death of an employee, their spouse and children were compensated based upon their level of dependence. If death from a workplace injury resulted within three hundred weeks of that injury, workers' compensation insurance paid the burial expenses up to one hundred dollars and paid the employee's dependents 55

---

[273]Ibid., 400-01.
[274]Ibid., 401.

percent of the deceased employee's wages for the remainder of the three hundred week period.[275] If the dependents were deemed only partially reliant on the decedent's earnings, compensation was based on how much the decedent contributed to the household income.[276] While this provision afforded immediate and certain relief to dependents of those killed in workplace injuries, the relief was often not enough to support the decedent's family.

The 1915 act represented a milestone for workers. It finally meant the end of the common law employers' defenses and guaranteed injured employees immediate and certain relief. The 1915 act also meant positive changes for employers. Employers could now plan for accident costs and purchase fixed cost insurance to pay for injuries, making their business costs much more determinable than under the common law of employers' liability.

While the 1915 act proved a great victory for progressives, workers, and many employers, it was not perfect. In 1917, the Indiana General Assembly made minor changes to the Indiana Workmen's Compensation Act.[277] The changes can be characterized as generally favorable to employees. They closed some

---

[275]Ibid., sec. 38, 402-3.

[276]Ibid., secs. 37-38. The act defined a wife who lived with her husband at the time of his death as wholly dependent (up to the time she remarried). The act defined a husband who lived with his wife and was incapable of self-support, a male child under the age of 18, a female child under the age of 18 and living at home, and physically or mentally incapacitated children as totally dependent.

[277]*Laws of the State of Indiana, 1917* (Indianapolis, 1917), chap. 63, secs. 1-4, 154-56; chap. 81, secs. 1-3, 226-28; chap. 99, secs 1-4, 313-37.

procedural loopholes that had caused delays in payments to injured employees and their dependents.[278] These amendments also sped up the appeals process, shortening times for filing briefs and adding penalties to awards that were held up in court by employers.[279] Indiana legislators recognized the difficult situation employees faced if they lost two full weeks of pay and thus shortened the waiting period from fourteen days to seven.[280] They also made changes in the rules for employers' insurance policies, requiring employers to hold more funds in reserve or increase their insurance coverage.[281]

In 1919, the Indiana General Assembly also made significant changes to the Industrial Board. Board membership was increased from three to five seats, and the term was extended to four years.[282] The legislature further required that two of the members be attorneys.[283] In 1929, the General Assembly consolidated the 1915 Act and amendments into a new statute, approved March 14, 1929.[284]

In December of 1915, Samuel R. Artman, a member of the newly created Industrial Board, addressed the annual convention of the Indiana Manufacturers

---

[278]Ibid., chap. 63, secs. 1-4, 154-56.

[279]Ibid.

[280]Ibid., chap. 81, secs. 1-3, 226-27.

[281]Ibid., chap. 99, secs. 1-4, 313-17.

[282]*Laws of the State of Indiana, 1919* (Indianapolis, 1919), chap. 57, sec. 50, 168.

[283]Ibid.

[284]*Laws of the State of Indiana, 1929* (Indianapolis, 1929), chap. 172, 536-68.

Association on the success of the new workers' compensation law.[285] Artman's address shows the initial success of the workers' compensation law and sheds light on the foundations of the act. He reported that despite the impressions of many, the Indiana Workmen's Compensation Act was a response to labor and to employers alike. According to Artman, employers supported the legislation; their attitudes and actions after the legislature passed the act confirm that idea.

Artman attributed part of the success of the act to the employers' ability to opt out of the act, although relatively few employers had done so.[286] Artman stated that overall employers were pleased with the law and its administration, explaining "[t]he number of employers that have manifested an obstinate and antagonistic attitude may easily be counted on the fingers of the two hands."[287] Artman conceded that some employers had neither opted out nor made a showing of insurance as required by the act, but believed they were not the majority. Employers chose to purchase workers' compensation insurance to benefit from fixed costs and the absence of attorney's fees characteristic of an adjudicating

---

[285]Samuel R. Artman, "Co-operation of Employers with the Industrial Board of Indiana on Compensation and Accident Prevention" (paper presented at the Second Annual Convention of the Indiana Manufacturers Association, Claypool Hotel, Indianapolis, December 8, 1915), Indiana State Library, Indianapolis.

[286]Only 2,503 of the state's employers exempted themselves from the act because of the relatively low accident rates in their trades. These were mostly small employers, employing largely professional men and barbers. Ibid., 3-4.

[287]Ibid., 4.

regime. Lower costs for compensation insurance appealed to many businessmen who could pass some of their savings along to consumers and still earn a greater profit.[288] And workers' compensation created better relationships between employees and employers. Artman noted that all parties were satisfied: "the system has produced a condition of harmony and a spirit of fraternity between employer and the employe [sic], and that strained relations have disappeared."[289]

Aside from speeches like Artman's, state reports also show the success of the 1915 legislation. Beginning in 1917, two years after the act's passage, the Industrial Board issued a yearly report to the governor, which was reprinted in the *Indiana Yearbook.* During the first year of statutory workers' compensation, 36,176 workers made claims for compensation totaling $893,433.28.[290] During the second year the Industrial Board reported, 42,253 workers made claims for compensation totaling $1,282,297.40.[291] The report also indicated that injured workers and employers were relatively satisfied with the new system as only 2.1 percent of the claims for compensation resulted in court contests.[292]

---

[288]Ibid., 8.

[289]Ibid., 9.

[290]*Indiana Yearbook, 1917,* 389-90.

[291]Ibid. The Industrial Board attributed the rise in the number of accidents from one year to the next to an increase in the number of young unskilled workers and the increase in industrial pressure as the nation stepped up production for World War I.

[292]Ibid.

In the *1918 Indiana Yearbook*, the Industrial Board conveyed that "[w]e are gratified to report that the basic principles of administration, as expressed in the Indiana Workmen's Compensation Law have been proven sound."[293] The Board found that injured workers were paid benefits without delay, conflicts and contests over payment were quickly resolved, and the number of industrial accidents (proportionate to population and industry) was declining.[294] In 1917, there were 37,520 accidents.

The *1919 Indiana Yearbook* also claimed that industrial accidents were declining because prevention had become a priority under the workers' compensation system.[295] In 1918, 35,232 accidents were recorded; 745 involved dismemberment and 268 resulted in death.[296] The railroads reported 3,915 injuries--25 dismemberments and 29 fatalities.[297] In 1919, there were 42,994 accidents, 919 of which were dismemberments and 291 fatalities.[298] In 1920, there were 34,369 accidents reported, 617 of which were dismemberments and 263 fatalities.[299] Of those 34,369 accidents, 3,041 were in the railroad industry, 18 of which were fatalities.[300]

---

[293]*Indiana Yearbook, 1918,* 453.
[294]Ibid.
[295]*Indiana Yearbook, 1919,* 262.
[296]Ibid.
[297]Ibid. Railroads reported specific information for the first time in 1919.
[298]*Indiana Yearbook, 1920,* 670.
[299]*Indiana Yearbook, 1921,* 456.
[300]Ibid.

The 1915 act brought significant changes to employers' liability law. Prior to its passage, injured workers were forced to turn to the court system for redress, despite the early attempts at offering workers some relief passed in 1893, 1899, and 1911. After the enactment of comprehensive legislation, workers could rely on immediate and certain relief for workplace injuries. The system established by the General Assembly in 1915 ignored any determination of fault and simply paid workers for all workplace injuries.

This transformation also significantly changed the relationship between employer and employee, making it less confrontational but also more paternal. For example, a poster from a Fort Wayne company, S.F. Bowser & Company, urged employees to do all they could to prevent accidents:

> "We can't put a guard on YOU—personal care is YOUR guard. Put it on and keep it on. It pays more than the law will pay . . . . BE CAREFUL! You owe it to yourself, to your family, to your company and to society in general. Let's get into this fight against injury—and win. We want to help you and want you to help us."[301]

Workers also gave up the possibility of larger verdicts for smaller payments for injuries while employers accepted and budgeted for the cost of workplace injury.

---

[301] Artman, "Co-operation of Employers with the Industrial Board of Indiana," 11.

Worker's compensation proved not to be the end of struggle for most wage laborers but it represented significant improvement in the status of most workers. Indiana's attempts at strong employers' liability defenses prior to the passage of the 1915 act were weak at best. The 1893 act, along with 1899 and 1911 modifications, were not able to address the problematic uncertainty of legal adjudication of workplace accident claims. These acts, while offering statutory support to the common law of negligence, did nothing to end or substantially curb the use of the employers' defenses of fellow-servant, contributory negligence, and assumption of risk.

Indiana reformers and legislators saw that other states and nations were adopting no fault comprehensive workers' compensation systems and began to consider supporting similar legislation. Support for change was widespread and included attorneys, insurance companies, workers, and unions. Only two years after the Indiana Workmen's Compensation Commission presented their ideas, the legislature passed a thorough workers' compensation statue. This statute transformed and modernized the way injured workers were treated in Indiana.

After the passage of the 1915 act, employees received reliable and immediate compensation for all workplace injuries. Injured employees were paid a set amount for a pre-determined time span based upon their specific injury and level of disability. All employers were required to participate, so payment for workplace injuries became considered a fixed business expense and business

owners no longer spent countless dollars in court defending claims of negligence. Businesses were required by the 1915 Statute to carry insurance to compensation, which allowed them to know their workplace injury budget in advance so they could build it into the cost of their goods and services. The Indiana Workmen's Compensation Act did what the courts and the legislature in Indiana had previously been unable to do, bring continuity to employers' liability law.

CONCLUSION

Indiana's move from common law employers' liability to a no fault compensation system was not an easy transition, despite the speed with which the Workmen's Compensation Act passed. At the end of the nineteenth century, Indiana was a primarily rural community with a preindustrial economy. Most Hoosiers were either self-employed farmers or craftsmen working at home or in small shops. When work-related injuries occurred, workers relied on their families, friends, and community until they could return to work.

Industrialization transformed the workplace, as the self-employed artisan gave way to the wage laborer. It also changed traditional notions of work, production, community, and the relationship between employer and employee. Industrialization also produced more workplace injuries than ever before. Injured workers turned to the legal system for redress, and judges turned to the common law for answers. The common law stated that employers were only liable for harms done to employees if the employer was negligent. Absent a showing of fault on the part of an employer, an employee could not recover. The common law also afforded employers three defenses to help overcome work-related personal injury claims: the fellow-servant defense, contributory negligence defense, and assumption of risk defense.

Through the examination of Indiana Supreme Court decisions this study shows that the employers' liability defenses and the negligence standard itself worked to transfer the cost of industrialization to the worker. Injured employees had to sue their employers to claim any damages at all. Employees often failed to file negligence suits against their employers because work was often in short supply and they did not want to damage their chances of returning to the same jobs after their recovery. Even in some of the most egregious cases where employees were clearly placed in the path of danger or given substandard tools to complete their jobs, the courts ruled in favor of the defendant employers.

Broadly, this thesis builds upon the conclusions of legal historians like Lawrence M. Friedman, Morton J. Horwitz, and Kermit L. Hall finding that law and society are intertwined. Still, Indiana's experience with workers' compensation law both challenges and agrees with their conclusions. Friedman contends that tort law and the railroads grew up together. In a sense this is true, however while the railroads and tort law may have grown from infancy to adolescence at the same time, in Indiana, the railroads continued to mature while tort law (as it related to railroad injures) remained stagnant throughout most of the period studied. Horwitz sees workers' compensation largely as a conspiracy of big business to keep workplace injury costs down at the expense of laborers and consumers. However, this study shows that laborers experienced the same uncertainty as business in the Indiana court system and likely supported

compensation legislation. This study agrees most with Hall, concluding that workers' compensation was a means for the legislature to distribute the cost of accidents.

The adoption of workers' compensation in Indiana also represents a struggle between the state courts and the legislature. Both bodies make law and while they often work with one another to provide consistent laws, workers' compensation did not follow this pattern. Throughout the period studied the Indiana Supreme Court remained conservative and rarely swayed by progressive thought. The Court remained laissez-faire because their decisions affirmed, rather than challenged, the existing common law. This thesis shows that the Indiana Supreme Court remained an observer, rather than an actor, in the struggle between workers and railroads. In the period studied, the Court failed to develop a comprehensive body of case law that either equitably or reliably distributed the cost of industrial accidents. A railroad worker injured in 1880 and one injured in 1914 faced the same uncertainty of recovery despite the sweeping developments in the economy and political philosophy. The Court was laissez-faire in the truest sense of the word--it did nothing.

The General Assembly, while initially reluctant to challenge the status quo, eventually passed progressive legislation in only a few years. The legislation passed before 1915 represented the same acceptance of the status quo that the Court demonstrated in its body of case law. Injured workers could rely no more on

the pre-1915 acts to estimate their success before the bench than on the Court's ambivalent body of case law. Finally, the 1915 act dramatically changed the adjudication of workplace accidents and shifted the cost of injuries firmly to businesses. This action removed the determination of liability from the courts altogether and established a non-judicial Industrial Board to oversee workers' compensation. The General Assembly acted to redistribute the cost of workplace accidents because the Court did not.

Indiana's experience provides an interesting example of the transition of a state's employers' liability laws because Indiana was not among the first or last states to pass workers' compensation legislation. Therefore, Indiana benefited from the early attempts of other states, such as New York, that failed on constitutional grounds. Indiana passed compensation legislation that quickly gained acceptance and avoided the constitutional challenges faced by other states. Also, in Indiana, as in most of the nation, the railroads (and to a lesser extent interubrans) were the consummate symbol of industrialization. Railroads were a vital part of Indiana's economy as they meant the ability to quickly transport raw materials and finished goods. Because there were so many miles of railroad tracks, ample Indiana Supreme Court cases involving railroad employee injuries are available for study. Yet, because Indiana did not have as large of a case load as other states, like New York, it was feasible to analyze several decades.

Looking at railroad-worker injury cases decided by the Indiana Supreme Court between 1880 and 1915 reveals little consistency. This examination also shows the failure of the Court to develop a body of case law to effectively manage workplace injury claims. Generally, common law evolves over time to meet the demands of society, but that did not happen in Indiana. As railroads became more secure and the effects of industrialization became more apparent, the Indiana Supreme Court failed to change the common law of employers' liability.

Often two cases with very similar fact patterns had completely different outcomes and few clues in the cases explaining why. This ambiguity gave injured workers and their employers little guidance as to the strength of potential cases, and possibly discouraged injured employees from seeking damages. Furthermore, sending a message that all claims would be judged on a case-by-case basis, without true adherence to precedent, encouraged railroads to litigate claims rather than offer settlements. Finally, the lack of continuity in judgments gave employers like the railroads examined in Chapter 3 no real incentive to provide safer work environments.

Specifically, Chapter 3 and the Appendixes illustrate the unpredictability injured plaintiffs would face in determining whether to sue their employers. Of the three available defenses--fellow-servant, contributory negligence, and assumption of risk--the fellow-servant concept proved to be the most effective for railroad defendants. The Court found for the railroads based on the fellow-servant defense

almost 60 percent of the time. The Court did attempt to ameliorate the effects of this by developing an exception, the "vice-principal" rule, which held employers responsible for injuries caused by supervisors. However, this limited exception was narrowly interpreted and proved not to temper the use of the fellow-servant defense by the railroads.

As government curtailed other benefits (e.g., tax exemptions, land grants, state, federal and local funding) that had promoted railroad development, the employers' liability defenses made less sense. By the late nineteenth century, railroads and industries symbolized wealth and power while uncompensated railroad workers symbolized the evils of industrialization. Yet so long as the legal system allowed the defenses, industrialists continued to use them.

Indiana's experience was similar to that of other states, and this survey broadly supports state studies on the adoption of workers' compensation. While no other inquiries exist specifically on state supreme court decisions, scholars characterize workers' compensation as a cooperative measure between business and labor created by state legislatures. As economists Shawn Everett Kantor and Price V. Fishback show in their examination Missouri also benefited from diverse support for workers' compensation from employers, labor unions, and bar associations.

Furthermore, Indiana and Washington shared similarities. Joseph Tripp's study of the Washington lumber industry shows that lumber employers, facing the

rising cost of litigation began to support compensation legislation only after they realized that they could no longer rely on consistent judgments. Indiana railroad executives, like the lumber industry executives, likely came to support compensation legislation when court adjudication proved unpredictable.

This thesis also shows that Indiana followed the early states passing compensation legislation, like New York. Robert F. Wesser's study of New York shows that the legislature passed a law supported by of business and labor alike. Robert Asher's analysis of New York workers' compensation legislation shows the important influence of progressive reformers in New York. In Indiana workers' compensation legislation passed amidst the wave of progressive reforms accepted by the Indiana General Assembly between 1913 and 1915.

While this thesis does not examine Indiana's Progressive movement in depth, the speed with which the Indiana Workmen's Compensation Act passed through the General Assembly stands as proof of the influence of the Progressive Movement. While the Indiana Supreme Court apparently remained immune to the widespread changes brought about by the Progressive Movement, the Indiana General Assembly did not. Only two years after the formation of the Workmen's Compensation Commission, the General Assembly passed comprehensive legislation removing forever the adjudication of workplace injury disputes from the courts. The 1915 Workmen's Compensation Act still serves as the basic underpinning of the present Indiana Workers' Compensation system.

APPENDIX A

THE FELLOW-SERVANT DEFENSE
1880-1915

CASE	YEAR	WINNER	INFORMATION
Turner v. City of Indianapolis (96 Ind. 51)	1883		Not a railroad case.
The Terre Haute and Indianapolis Railroad Company v. McMurray (98 Ind. 358)	1884	Affirmed for Plaintiff	The Plaintiff, a brakeman, had his foot crushed and needed immediate surgical attention. The train conductor retained a surgeon and the Defendant (RR company) did not want to pay but trial court ruled the railroad was responsible. Generally, train conductors cannot make contracts with surgeons, but this case was an exception. The Court ruled that the facts of each case can affect who is held to be a fellow servant.
The Indiana Car Company v. Parker (100 Ind. 181)	1885	Affirmed for Plaintiff	The Plaintiff was injured (fingers cut off and hand paralyzed) by running a cut-off saw (circular) on a grooved table when the rope that held the saw back broke. The foreman knew of the problem with the rope. The Court ruled the Defendant was negligent for purchasing and maintaining faulty machinery and directing employee to work on it. The court ruled that the fellow-servant defense cannot be used to delegate safety enforcement.
The Atlas Engine Works v. Randall (100 Ind. 293)	1885	Reversed for Defendant (with costs)	Not a railroad employee

CASE	YEAR	WINNER	INFORMATION
The Indianapolis and St. Louis Railway Company v. Johnson (102 Ind. 352)	1885	Reversed for Defendant	The Plaintiff, a switchman, caught his foot in the rails while coupling cars and an engine backed up injuring him. The Court found the complaint failed to allege anyone other than a fellow servant caused the injury. The Court firmly holds that if a fellow servant causes an injury, the master is not liable.
The Pittsburgh, Cincinnati and St. Louis Railway Company v. Kirk (102 Ind. 399)	1885	Affirmed for Plaintiff	Not a fellow servant case.
The Indianapolis and St. Louis Railway Company v. Johnson (102 Ind. 352)	1885	Petition for rehearing by Plaintiff denied	The Plaintiff failed to show that the fellow servant was really a master. The Plaintiff was a brakeman who also occasionally loaded cars. The Court ruled that, in determining whether an employee is a fellow servant or stands in the shoes of the master, his title does not matter, only actions.
The Lake Shore and Michigan Southern Railway Company v. Stupak (108 Ind. 1)	1886	Reversed for Defendant	The Plaintiff was injured by the actions of another employee who was negligently hired and retained. The Court found that the two employees were fellow servants and no recovery was available for the Plaintiff. However, the employee failed to allege he had no knowledge of the fellow servant's incompetence and may have therefore assumed the risk by his continued employment.
The Indiana, Bloomington and Western Railway Company v. Dailey (110 Ind 75)	1887	Reversed for Defendant	The Plaintiff, a brakeman, was injured when an engineer brought a train onto the tracks without warning and because of a bad coupling pin in the tracks, the train ran into the Plaintiff's train. The Court found that the engineer and brakeman were fellow servants.

CASE	YEAR	WINNER	INFORMATION
Krueger, Admin. v. The Louisville, New Albany and Chicago Railroad Company (111 Ind. 51)	1887	Reversed for Plaintiff	If a master delegates a duty to another employee, and an injury results from that action, the master cannot claim the fellow-servant defense. This negligent act remains one of a master and not a fellow servant.

CASE	YEAR	WINNER	INFORMATION
The Indianapolis and St. Louis Railway Company v. Watson (114 Ind. 20)	1887	Reversed for Defendant	The Plaintiff, a night watchman, was injured when he fell into a hole and was injured because he did not have the light he requested. The Court touched on the fellow-servant defense in that the Defendant argued that the employee who failed to provide a lantern to the night watchman and the night watchman were fellow servants and the Defendant was not responsible for the injuries; however, the Court relied more heavily on other defenses. The Defendant also argued that the night watchman assumed the risks of employment when he continued to work after a defect is known. The Plaintiff was a night watchman and the Court ruled the employee should have a light to do duties but the railroad did not provide one, promised to but had not yet done so, and was injured because of this. In looking at the evidence the jury evaluated, the Court did not interpret a promise because the other employee told he would be lucky to get a lantern in a month. The Court stated "[i]t is the application of the rule as made by the appellee, and the principle it asserts, that we deny." The Court found that it cannot be contributory negligence to continue to work without the lantern. Court is reluctant to make this decision but does. Employee assumed risk and was contributory negligence where he worked in the rail yard without a lantern. Although he informed the Defendant that he needed a lantern, it was unreasonable for him to continue working for the RR because of the immediate and great threat of harm.

CASE	YEAR	WINNER	INFORMATION
The Evansville and Terre Haute Railroad Company v. Guyton (115 Ind. 450)	1888	Affirmed for Plaintiff	A conductor ran a train off schedule leading to the Plaintiff's injuries. The Defendant (RR company) argued that the conductor and the Plaintiff were fellow servants but this Court held that the Plaintiff should recover. The Court was persuaded by the fact that the conductor was recently promoted and may not have been trained properly. A unique exception to the fellow-servant defense.
The Louisville, New Albany and Chicago Railway Company v. Sandford, Admin. (117 Ind. 265)	1889	Reversed for Defendant (petition for rehearing denied)	The Plaintiff, a baggage master, was injured when a bridge collapsed. The Defendant first argued that the fellow-servant defense applied because the baggage master Plaintiff was a fellow servant to the employee in charge of bridge safety. The Court ruled in favor of the Defendant but based its ruling in part on the other defenses. The Defendant railroad company argued that the Plaintiff assumed the risk of employment because he knew the bridge was in disrepair but continued to work. The Defendant also argued that the Plaintiff was contributorily negligent because he continued to work, despite dangerous conditions.
The Cincinnati, Hamilton and Dayton Railroad Company v. McMullen Admin. (117 Ind. 439)	1889	Affirmed for Plaintiff (with costs)	The Plaintiff, a conductor of a railroad freight train, died while doing job when the handle of appliance broke causing him to lose balance and fall between the moving cars. The Defendant (RR company) contended that the death was due to the negligence of the inspector and that meant the fellow-servant defense would apply. The Court held that the fellow-servant defense did not apply. The Court found that the Defendant cannot delegate safety monitoring and claim a fellow-servant defense when an injury occurs.

CASE	YEAR	WINNER	INFORMATION
The Cincinnati, Indianapolis, St. Louis and Chicago Railway Company v. Lang, Admin. (118 Ind. 579)	1889	Reversed for Defendant	The fellow-servant defense was available when one employee did not follow prescribed safety rules and that resulted in the injury of another employee. The Defendant (RR company) was liable for its own negligence, but not that of employees, where it established safety rules. This case also discussed contributory negligence.
Taylor v. The Evansville and Terre Haute Railroad Company (121 Ind. 124)	1889	Reversed for Plaintiff	The Defendant's master mechanic, with sole charge of the railroad department where the Plaintiff worked, was considered a vice principal and not a fellow servant. The Court held that the two employees were not fellow servants because the master mechanic controlled the department, and assigned the specific task from which injury resulted and employee had a duty to obey.
The Lake Shore and Michigan Southern Railway Company v. Stupak (123 Ind. 210)	1890	Reversed for Defendant	The Plaintiff fell between two railroad cars and was permanently disabled when an engineer put an engine on the track without warning the Plaintiff. Although generally the master is not liable for servant injury by a fellow servant, the master was liable for negligently retaining a careless or negligent servant. The Plaintiff argued that the Defendant (RR company) was negligent because it must hire competent workers. The Court found that the engineer and the Plaintiff were fellow servants. Not a great case because it was a question of how much jury knew and could know.
Nall, Admin. v. The Louisville, New Albany and Chicago Railway Company (129 Ind. 268)	1891	Affirmed for Plaintiff	The Court held that a vice principal continued to stand in the shoes of a master, and did not become a fellow servant when he ordered a servant to perform a specific task he does usually performed.

CASE	YEAR	WINNER	INFORMATION
Justice v. The Pennsylvania Company (130 Ind. 321)	1892	Affirmed for Defendant	The Plaintiff, a railroad employee, was injured when he fell off a handcar operated by a section foreman while riding home at the end of the day. The Plaintiff argued that the fellow-servant rule did not apply because a section foreman was a vice principal to the Plaintiff. The Court disagreed and found that when employing and discharging servants, the section foreman was a vice principal but the employees were fellow servants when out of his control and after their employment at the end of the day. The Court held that the section foreman was a fellow servant and the Plaintiff was precluded from recovery.
Rush v. The Coal Bluff Mining Company (131 Ind. 135)	1892		Not a railroad case
The Louisville, Evansville and St. Louis Consolidated Railway Company v. Hanning, Admin. (131 Ind. 528)	1892	Affirmed for Plaintiff with costs	Plaintiff, a car repairer, was repairing a car on a side track underneath the car and was crushed by an approaching car that he did not see. The Plaintiff claimed that the Defendant (RR company) was negligent because it did not place signal flags at entrance to side track as was customary. Further, the Plaintiff argued that he did not usually repair on side tracks but rather in the warehouse so he was outside of normal scope of duties. The Defendant railroad company argued that the person in charge of placing signal flags was a fellow servant to the injured Plaintiff. The Court however held that the master had a duty to provide a safe workplace and cannot delegate that responsibility to a fellow servant. Also, the Court held that the Plaintiff did not assume the risk of injury.

CASE	YEAR	WINNER	INFORMATION
The Wabash and Western Railway Company v. Morgan (132 Ind. 430)	1892	Affirmed for Plaintiff	Mostly a case on procedure and jury instructions. Master bound to use care, skills and prudence in selecting and maintaining machinery.
Clarke v. The Pennsylvania Company (132 Ind. 199)	1892	Affirmed for Defendant	The Plaintiff, a railroad employee, was injured when his supervisor overtook him on a train causing the Plaintiff to fall off train and he was then hit by moving train. The Plaintiff argued that the fellow servant rule does not apply because it was his supervisor that caused the injuries. However, the Court found that the two employees were fellow servants because they were doing the same work and the Defendant prevailed. The Court also found that an action when done in response to imminent danger was not contributorily negligent because different circumstances apply.
Hoosier Stone Company v. McCain, Admin. (133 Ind. 231)	1892	Reversed for Defendant and new trial	Not a railroad case
Cleveland, Cincinnati, Chicago and St. Louis Railway Company v. Ketcham (133 Ind. 346)	1893	Affirmed for Plaintiff	Passenger, not an employee.

CASE	YEAR	WINNER	INFORMATION
The Evansville & Terre Haute Railroad Co. v. Duel (134 Ind. 156)	1893	Reversed for Defendant	The Plaintiff was repairing a train when the throttle valve which let in and cut off steam from the cylinders of the engine did not open and the engine moved suddenly. The Defendant (RR company) argued that the Plaintiff could not recover because it was a fellow servant who left the defective throttle on the engine. The Court found for the Defendant, but states that part of the reason was a flaw in the Plaintiff's complaint as he did not allege that his master knew of the danger.
The Cincinnati, Hamilton and Indianapolis RR Co. v. Madden (134 Ind. 462)	1893	Affirmed for Plaintiff	The Plaintiff, a track hand who cared for a section of track by cutting weeds, tamping ballasts, watching for and removing dangers from track, was asked to unload steel rails from the construction train, which was something different than traditionally he did. An engineer (known to be incompetent by the Defendant) jerked the train forward and the Plaintiff was injured and had to have legs amputated. The Defendant argued that the Plaintiff and the engineer were fellow servants and that the Plaintiff was contributorily negligent. The Court found for the Plaintiff because he was not contributorily negligent in following orders unless the danger and peril to life and limb in the new service into which Plaintiff was ordered was so glaring that no prudent man would have entered into it. Generally rule is that servant accepts all ordinary dangers but does not fit when Plaintiff is asked to step out of ordinary role and do something else.
The New York, Chicago and St. Louis Railroad Company v. Perriguey (138 Ind. 414)	1893	Reversed for Defendant	The Plaintiff, an engineer, was hit and injured by another train whose engineer was conducting his train without a headlight. The Plaintiff argued that the Defendant (RR company) was liable because the other engineer, an employee of the Defendant's company, was negligently operating his train without a headlight. Still, the Court found that the injury was caused by a fellow servant and therefore bars recovery.

CASE	YEAR	WINNER	INFORMATION
The Louisville, New Albany and Chicago Railway Company v. Berkey, Admin. (136 Ind. 181)	1893	Affirmed for Plaintiff	The Plaintiff, a front brakeman, was thrown off a train and killed when a bad coupling pin caused a train to derail. The Defendant (RR company) claimed that there were rules in place that the Plaintiff did not follow but evidence showed Plaintiff did not know of rules. The evidence also showed that master must have known about bad pin or must have with reasonable diligence and attention to business been able to know. The Court stated that, "[t]he rule appears to be that when it is shown that the master or his agent has placed a defective appliance in the hands of his servant, which occasioned his injury while in the exercise of due care and caution, the burden shifts, and the master is then required to show that he exercised due care in their selection or manufacture." The Court held that the fellow servant rule does not apply.
The Ohio and Mississippi Railway Company v. Dunn (138 Ind. 18)	1894	Reversed for Defendant	The Plaintiff, a car coupler, was injured when an engineer negligently allowed a car onto the tracks. Further, the person acting as a switchman was actually a fireman, who had occasionally served as engineer in a switch yard. The Plaintiff argued that putting the fireman in the role of engineer meant that the Defendant (RR company) was negligent because they knew the fireman did not have proper training but the Court does not agree. The Defendant argued that the fireman (turned engineer) was a fellow servant of the coupler and that this precluded recovery. The Court held that the Plaintiff and the fireman were fellow servants and ruled in favor of the Defendant. The Court found that a negligent employee is not the fault of the railroad company.

CASE	YEAR	WINNER	INFORMATION
The Evansville and Richmond Railroad Company v. Barnes (137 Ind. 306)	1894	Reversed for Defendant	The Plaintiff, a railroad repair man, was injured while riding on a construction train when the train derailed from an incomplete track. The Defendant (RR company) argued that the Plaintiff knew that the track was not all the way done and rode the train anyway and that the Plaintiff was a fellow servant with the engineer of the train. The Court agreed with the Defendant, finding the fellow-servant defense as well as the assumption of risk defense barred the Plaintiff's recovery.
The New York, Chicago and St. Louis Railroad Company v. Perriguey (138 Ind. 414)	1894	Reversed for Defendant	The Plaintiff, a brakeman, was injured when he went to the front of a train to relight a defective lantern and was thrown from the train. The Defendant's train had defective lantern and when the wind blows out the light, the brakeman was left in darkness and had to relight the lantern. The Court found that Plaintiff cannot recover against the Defendant (RR company) because it was the conductor's responsibility to make sure the light was lit properly. The Court held that the conductor and the brakeman were fellow servants and the Defendant was not liable for the injuries. Concur – Howard. Finds the fellow servant defense argument good but does not agree that contributory negligence on the part of an employee voids negligence on the part of the employer.

CASE	YEAR	WINNER	INFORMATION
The Pennsylvania Company v. McCaffrey, Admin. (139 Ind. 430)	1894	Affirmed for Plaintiff	Plaintiff, a railroad employee, was killed when he was attempting to get out of the way of an oncoming hand car and fell. The Plaintiff alleged the railroad company was negligent because they operated the hand car with only a fireman and a brakeman so they were liable for the resulting injuries. The Defendant alleged that the brakemen operating the hand car were fellow servants of the Plaintiff. The Court agreed with the Plaintiff, finding that when a railroad company violates a safety rule, causing an accident, they must accept responsibility for all resulting injuries.
Newtz v. Jackson Hill Coal and Colke Company (139 Ind. 411)	1894	Affirmed for Defendant	Not a railroad employee.
Sheets, Admin., etc., v. Chicago and Indiana Coal Railway Company (139 Ind. 682)	1894	Affirmed for Defendant	The Plaintiff, a brakeman, was killed when his foot was caught in an open block and a train ran over him. The Defendant (RR company) argued that the engineer who ran over the Plaintiff and the Plaintiff were fellow servants and this Court agreed. The Court also states that the brakeman was experienced and should have known better.
Neutz v. Jackson Hill Coal and Coke Company (139 Ind. 411)	1894	Petition overruled	Petition finds that if a farmer takes hogs to a railway for shipment in the company's car, it is reasonable and the theory plausible that he should not be required, at the hazard of liability, to inspect the car for the protection of his servant who aids him in loading the truck. Not a railroad case

CASE	YEAR	WINNER	INFORMATION
The Ohio and Mississippi Railway Company v. Stein (140 Ind. 61)	1894	Affirmed for Plaintiff	The Plaintiff, a brakeman, was injured when a defective engine loaded with heavy stone detached from engine without working brakes causing one car to hit another and the heavy stone fell on the Plaintiff. The Plaintiff showed that notice had been given to the foreman of the railroad company that the company's machines were bad and the Court held this to be good notice to the company. The Court found that if the master appoints someone to do his duties, this person is not a fellow servant. The foreman of the machine shop may be both a fellow servant and a vice principal and this determination is made based on what they were doing at the time of the injury. Here, the Court held the foreman to be a fellow servant to the Plaintiff.
Louisville, Evansville and St. Louis Consolidated Railroad Company v. Miller, Admin. (140 Ind. 685)	1895	Affirmed for Plaintiff	The Plaintiff, a freight conductor, was killed when his railroad car came off the tracks because the track was in disrepair. The facts show that the railroad was in a state of disrepair-- there were no ballasts in the roadbed, many ties were broken, and the ties were so rotten that they could not hold the spikes driven into them. The Court found that the Defendant (RR company) must have known or certainly had opportunity to know (the opportunity for discovery) of these defects. The Defendant argued that the company's repair man should have fixed the railroad tracks and that the repair man was a fellow servant to the freight conductor but the Court did not agree. The Court held that the duties of repair rested on the master and cannot be delegated to a fellow servant.

CASE	YEAR	WINNER	INFORMATION
The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Sullivan (141 Ind. 83)	1895	Reversed for Defendant with costs	The Plaintiff, a brakeman, was injured by a train. The Plaintiff's supervisor called in surgeon and Plaintiff told his supervisor that he did not want his arm amputated and the surgeon agrees but then it becomes medically necessary to amputate it. The Court found that the Defendant (RR company) was not liable because they did not have a better choice. Fellow-servant rule applies here because the Plaintiff and the Plaintiff's supervisor are considered co-servants for this claim.
The Baltimore and Ohio and Chicago Railroad Company v. Paul (143 Ind. 23)	1895	Reversed for Defendant	The Plaintiff, a brakeman, was injured when he was hit by a train. The Plaintiff claimed that his tools, provided by the Defendant, were defective and that the engineer operating the train was negligent. The Court found that fellow-servant rule precluded recovery here because the Plaintiff was a fellow servant to the engineer.
Evansville and Terre Haute Railroad Co. v. Tohill, Admin., etc. (143 Ind. 49)	1895	Reversed for Defendant	The Plaintiff, an engineer, was killed while waiting on a side track when a train dispatcher let a train go ahead of schedule (against the Defendant company's rules). The Court found the train dispatcher to be a fellow servant of the engineer which barred recover against the Defendant (RR company).
Evansville and Terre Haute Railroad Co. v. Tohill, Admin., etc (143 Ind. 49)	1895	Petition for new hearing granted	See other case above.

CASE	YEAR	WINNER	INFORMATION
The Terre Haute and Indianapolis Railroad Co. v. Becker, Admin. (146 Ind. 202)	1896	Reversed for Defendant	The Defendant railroad company operated a single-track road. The Plaintiff, an employee of this railroad, was killed by a railroad car and the Court held that the engineer was a fellow servant of the injured Plaintiff and barred recovery.
Louisville, New Albany and Chicago Railway Company v. Bates, Admin. (146 Ind. 564)	1896	Reversed for Defendant	The Plaintiff, a brakeman, was killed while coupling cars. The Plaintiff alleged that the track was unsafe. The Court, however, ruled for the Defendant (RR company) holding that while railroads must generally provide safe cars, they need not always provide absolutely safe cars and they are not the insurer. Further the Court agreed that railroad companies, like the Defendant here, were not required to have inspectors which are sufficiently skilled and competent. The fellow servant rule applies here because the person in charge of keeping the track safe was a fellow servant to the Plaintiff.
Robertson v. The Chicago & Erie Railroad Company (146 Ind. 486)	1896	Affirmed for Defendant	The Plaintiff, a railroad machine repair shop employee, was injured while lifting a steam chest on a locomotive because the other employee who promised to help, did not. The Plaintiff was discharged and could not obtain work. The Court held, "[t]he rule in this State, now firmly settled, is that a difference in rank or the power to control and direct or to discharge from service is not the test as to whether one is a fellow servant or a vice principal. The controlling inquiry must be as to whether the act or omission resulting in injury involved a duty owing by the master to the injured servant." The Court found that because the other employee was working alongside the Plaintiff they were fellow servants and the Plaintiff could not recover for damages.

CASE	YEAR	WINNER	INFORMATION
Kerner, Admin. v. The Baltimore and Ohio Southwestern Railway Company (149 Ind. 21)	1897	Affirmed for Defendant	The Plaintiff, a railway employee charged with holding a driving spring in an engine while another employee hammered it in, was struck with a heavy iron and killed. The Defendant (RR company) argued that the Plaintiff could not recover against the Defendant because the injury was done by a fellow servant, and the Court agreed. The Court found that the Defendant (RR company) was not liable because the company foreman, even though operating the large hammer, was acting as a fellow servant and not a vice principal at the time of the injury.
The Baltimore and Ohio Southwestern Railway Company v. Little, Admin. (149 Ind. 167)	1897	Reversed for Defendant	The Court found that the common law fellow servant rule applied and not the Employer's Liability Act of 1893 because the Act was not meant to make corporations liable where a servant does an act or omits an action in obedience to the command of the corporation based on a rule, regulation or by-law or through a person delegated with authority. The Court reasoned that the fellow servant rule applies here, and found that the Plaintiff could not collect for injuries caused by the negligence of the switchman because he was considered a fellow-servant.
Louisville, New Albany and Chicago Railway Company v. Heck, Admin (151 Ind. 292)	1898	Affirmed for Plaintiff	The Plaintiff, a fireman, was killed when his train collided with a freight train. Both trains were moving under direction of the Defendant (RR company) and neither train knew of the other. The Court finds that the Defendant's negligence was the proximate cause of the death of the Plaintiff, although the train's conductor may have violated a rule requiring there to be a footman before and behind the train with danger signals at certain distances. The Court found that the injured Plaintiff should recover because supervision of the entire railroad business by the Defendant's Superintendent was considered the action of a vice principal and not a fellow servant. The train dispatcher is not considered a fellow servant.

CASE	YEAR	WINNER	INFORMATION
Hodges v. Standard Wheel Company (152 Ind. 680)	1898	Affirmed for Defendant	Not a railroad case.
The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Hosea, Admin. (152 Ind. 412)	1899	Affirmed for Plaintiff	The Plaintiff entered into contract for acceptance of benefits for any injury or death resulting from his employment but this does not operate as a release of all claims under the Employer's Liability Acts. Even though the Plaintiff's widow may be barred, child of decedent is not. Not really a fellow servant case.
Louisville, New Albany and Chicago Railway Company v. Wagner (153 Ind. 420)	1899	Affirmed for Plaintiff	The Plaintiff's arm was crushed while loading a heavy truck onto a flat car. The Plaintiff's foreman was coordinating the effort and gave an order to let the truck go without warning the Plaintiff, causing the injury. The Defendant argued that the Plaintiff was barred from recovery because the Plaintiff and the foreman were fellow servants but this Court disagreed. The Court holds the Defendant liable but does not give good reasoning to back it up with the fellow servant defense.
City of Fort Wayne v. Christie, Admin. (156 Ind. 172)	1901	Affirmed for Plaintiff	Not a railroad employee.

CASE	YEAR	WINNER	INFORMATION
The Baltimore and Ohio Southwestern Railway Company v. Peterson, Admin. (156 Ind. 364)	1901	Affirmed for Plaintiff	The Plaintiff was repairing and cleaning the railroad tracks in switch yard when he was pushed and kicked backward on the track and was killed by a car. The Defendant (railroad company) argued that the Plaintiff was barred from recovery under the fellow-servant defense because the engineer driving the train and the Plaintiff were fellow servants but the Court did not agree. The Court finds that the engineer was not a fellow servant of the Plaintiff's, and the Plaintiff therefore recovers.
Indianapolis Union Railway Company v. Houlihan (157 Ind. 494)	1901	Reversed for Defendant	The Plaintiff, a telegraph operator at a railway crossing charged with monitoring coming and going trains, crossed the track to get to work. The Plaintiff did not see the oncoming train because of posts and overgrown weeds in the rail yard, and was struck and injured by the train. The Court held that the responsibility to cut down posts and overgrown weeds belonged to a fellow servant of the Plaintiff so the Defendant (RR company) was not liable.
Thacker v. Chicago, Indianapolis and Louisville Railway Company (159 Ind. 82)	1902	Reversed for Defendant	The Plaintiff, a section hand, was injured when the car he was riding on suddenly stopped, throwing him from the train. The section foreman was driving the hand car and made the sudden stop which caused the Plaintiff's injury. The Court found that the Defendant (RR company) was not liable for the injury of an employee resulting from the act of a fellow servant, despite the fact that a foreman caused the injury. The Court reasoned that holding the Defendant liable goes against reason because the order to stop the car at a crossing was proper, but it was executed in a negligent manner by a fellow servant.

CASE	YEAR	WINNER	INFORMATION
The Baltimore and Ohio Southwestern Railway Company v. Reed (158 Ind. 25)	1902	Reversed for Defendant	Employer's liability does not apply because injury occurred in another state.
The Baltimore and Ohio Southwestern Railway Company v. Jones (158 Ind. 87)	1902	Reversed for Defendant	The Plaintiff, a locomotive engineer running a passenger train, was injured when his train collided with another train. The Court finds that the injury was caused by a fellow servant so under common law, the Plaintiff recovers nothing.
Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Gipe, Admin. (160 Ind. 360)	1903	Reversed for Defendant	A widow, the Plaintiff, was the beneficiary of railroad relief fund certificate and when her husband died she cashed it, accepted the amount, signed a receipt and a release of all claims for damages against the RR company. The receipt is offered in this case as a prima facie bar against claims from the widow and claims from the children of the deceased. The Court finds that, under these circumstances, the injury was caused by the negligence of a fellow servant so the Plaintiff recovers nothing.

CASE	YEAR	WINNER	INFORMATION
The Southern Indiana Railway Company v. Martin (160 Ind. 280)	1903	Reversed for Defendant	The Plaintiff was injured while unloading and hauling stone on train. The Defendant argued that they were not responsible for the Plaintiff's injury because a fellow servant had caused the injury and the Court agreed. The Court found that the person directing the Plaintiff was not his usual foreman but a fellow servant. The Court reasoned that the master may delegate the duties of a foreman with no responsibility to his other servants and that the only duty imposed on the master is not to retain an incompetent or negligent foreman.
Lake Erie & Western Railroad Company et al. v. Charman, Admin. (161 Ind. 95)	1903	Reversed for Defendant	The Plaintiff, a switchman, was killed while fastening broken cars together with a chain under the orders of his yardmaster when another employee backed an engine against the cars the Plaintiff was coupling. The Court found that the yardmaster was negligent but also that the yardmaster was a fellow servant to the switchman so the Plaintiff receives no recovery.
American Rolling Mill Company v. Hullinger (161 Ind. 673)	1903	Reversed for Defendant	Not a railroad case.

CASE	YEAR	WINNER	INFORMATION
Southern Indiana Railway Company v. Harrell (161 Ind. 689)	1903	Reversed for Defendant	The Plaintiff was injured while building bridge for the Defendant railroad company. While taking a break, the Plaintiff was sitting on a projecting board and was hit by lifted stone. The Court found that because the Plaintiff was not doing something foreman or supervisor told him to do, and he was thus not working, his claim of negligence will not stand. Also, the Defendant company cannot be held liable for the action of employees while on break. Here, an employee assumed the risk of negligence of a fellow servant and can overcome that only by showing negligence in hiring or selection of those employees, which is not done here. If a supervisor works alongside the employees he is still considered a fellow servant.
Indianapolis & Greenfield Transit Company v. Foreman (162 Ind. 85)	1904	Reversed for Defendant	The Plaintiff, an interurban employee, was considered a fellow servant with employees in charge of the passenger car that transported him to work. The Plaintiff was injured while on passenger car by the negligence of person in charge of said car so no recovery at common law. The Court found for the Defendant because they did not show that the fellow servant was incompetent, or incompetent to the point that the Defendant (interurban company) knew or could have reasonably discovered.

CASE	YEAR	WINNER	INFORMATION
Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Lightheiser (163 Ind. 247)	1904	Reversed for Defendant	The Plaintiff was knocked down and injured by a mail car that was running backwards in rail yard. The Court found the Defendant was not at fault because the Plaintiff did not show a duty to have someone posed on both ends of train, lights, etc. The Court explained that the Plaintiff, in order to recover, must not only allege duty but must show facts. Under the common law, the Plaintiff's complaint must show affirmatively that the servant whose negligent act caused such injury was not a fellow servant, and the duty broken was one owing by the master.
Dill v. Marmon (164 Ind. 507)	1905	Reversed for Defendant	Not at railroad case.
City of Indianapolis et al. v. Cauley (164 Ind. 304)	1905	Affirmed for Plaintiff	The Plaintiff, an interurban repairman, was injured when a construction worker took a car on a weak bridge and the bridge fell. The Court found that a negligent construction worker cannot be found to be a fellow servant of the injured Plaintiff. The Court maintained that the Plaintiff could not avoid the injury and because the company knew bridge in disrepair and used anyway, they should have warned the Plaintiff. The fellow-servant defense was not the deciding principle in this case.
Chicago Terminal Transfer Railroad Company v. Vandenberg et al. (164 Ind. 470)	1905	Affirmed for Plaintiff	The Plaintiff was injured while hauling trains on a track that the Defendant (RR company) had contracted to use when the negligence of an employee of the contracted company caused the harm. The Court found that employees of one railroad are not fellow servants of the other so the Plaintiff recovered.

CASE	YEAR	WINNER	INFORMATION
Louisville & Nashville Railroad Company v. Gillen (166 Ind. 321)	1905	Reversed for Defendant	The Plaintiff lost an eye when another employee used a defective hammer. The Court found that Plaintiff cannot recover because the employee operating the hammer was a fellow servant of the Plaintiff. The Court further explained that a Plaintiff must allege in his complaint and show that he was in the line of duty when injured.
Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Lightheiser (168 Ind. 438)	1906	Affirmed for Plaintiff	The Plaintiff was hit by a railroad car while standing between two incoming cars for the purpose of directing those cars on the sidetrack. The Court found that the engineer in control of one of the cars was negligent because backed it up without a person stationed on the rear of the cab as required by safety regulations. The Court ruled that the fellow-servant defense does not apply in this circumstance because one employee cannot assume that another fellow servant will fail to follow safety precautions.
Chicago & Erie Railroad Company v. Lawrence, Admin. (169 Ind. 319)	1906	Affirmed for Plaintiff	The Plaintiff, a switchman, was riding on the back of a train carrying a lantern, as he was required to, when another train without back up lights hit his train. The Plaintiff fell off the train and was killed by the other train. The Defendant (RR company) alleged that the engineer driving the train without a light was a fellow servant of the Plaintiff's and that the Defendant was not liable for the Plaintiff's injuries but the Court did not agree. The Court also found that the Plaintiff was not contributorily negligent because did not know of position of other car.

CASE	YEAR	WINNER	INFORMATION
Chicago, Indianapolis & Louisville Railway Company v. Williams, Admin. (168 Ind. 276)	1906	Affirmed for Plaintiff	The Plaintiff, a car coupler, was crushed and killed when his supervisor allowed an engineer to back up a train before Plaintiff gave his ready signal. The Court finds that the Defendant (RR company) is liable for the negligence of their vice-principals and in this case, the supervisor is not found to be a fellow servant to the Plaintiff, but rather, to stand in the shoes of the master. The Defendant is held liable for the Plaintiff's injury.
Bedford Quarries Company v. Bough (168 Ind. 671)	1907	Reversed for Defendant	Not a railroad employee
Indianapolis Street Railway Company v. Kane (169 Ind. 25)	1907	Affirmed for Plaintiff	The Plaintiff was ordered by a foreman to fix the track on a bridge and while propping up the foot bridge for traffic a large timber fell on the Plaintiff. The Court found that the Plaintiff showed negligence on the part of the Defendant (RR company) and the fellow servant defense does not apply because the foreman was acting on behalf of the master.
Perry, Matthews, Buskirk Stone Company v. Fletcher, Admin. (168 Ind. 348)	1907	Reversed for Defendant	Not a railroad case.
Ft. Wayne & Wabash Valley Traction Company v. Crosbie (169 Ind. 281)	1907	Reversed for Defendant	The Plaintiff, a motorman, was overworked and had not slept, but the Defendant put him in charge of an interurban car. The Plaintiff's car collided with another car and caused the Plaintiff's injury. The Court found that the Defendant (Interurban) was not liable because the collision was between two fellow servants.

CASE	YEAR	WINNER	INFORMATION
Southern Railway Company v. Elliott (170 Ind. 273)	1907	Reversed for Defendant	The Court finds that at common law, the locomotive engineer and the brakeman of a train are fellow servants. Here, a brakeman is injured due to the negligence of an engineer and the Court finds no recovery.
Chicago, Indianapolis & Louisville Railway Company v. Barker, Admin. (169 Ind. 670)	1908	Reversed for Defendant	The Court held that all persons engaged by the master in carrying on the common enterprise are fellow servants of each other. The Defendant (RR company) left a switch open and the Plaintiff (engineer) was killed when a freight train hits another car. Although handling the switch was operated by one of RR company's highest officials, the Court found that this was the work of a fellow servant and awarded the Plaintiff no recovery. Also track repairer was considered a fellow servant because keeping track in repair would not be a master's duty.
Haskell & Barker Car Company v. Przezdziankowksi (170 Ind. 1)	1908	Reversed for Defendant	The Defendant (RR company) used a railroad type track in a manufacturing plant and the Court finds that this operation does not constitute a railroad for purposes of this negligence claim. The Plaintiff was injured by an empty truck left too near track causing a wreck but the Court barred recovery. This case also discusses the assumption of risk defense and found that workers assume the negligence of their fellow workers--thus the fellow-servant rule applies.
Wabash Railroad Company v. Hassett, Admin. (170 Ind. 370)	1908	Reversed for Defendant	The Court finds that the conductor of one freight train and the locomotive engineer of another train are fellow servants. In this case, no liability found against the Defendant (RR company) when their conductor was killed by engineer's negligence.

CASE	YEAR	WINNER	INFORMATION
Indianapolis Traction & Terminal Company v. Kinney, by Next Friend (171 Inc. 612)	1908	Reversed for Defendant	The Plaintiff, a member of an interurban construction crew, was injured while unloading rails from a flat street car as the Defendant's foreman had ordered. The Defendant argued that the foreman was a fellow servant and that the Plaintiff should be barred from recovery. The Defendant further argued that, despite the fact that the foreman was authorized to give orders, he continued to be a fellow servant while working alongside the other employees and stands in the master's shoes (and accepts liability) only when in the performance of the master's duties. The Court agrees with the Defendant and bars recovery for the Plaintiff.
Cleveland, Cincinnati, Chicago and St. Louis Railway Company et al. v. Gossett, Admin. (172 Ind. 525)	1909	Affirmed for Plaintiff	This case involves two employees from different companies who were working together, when one was injured. The Court rules that an employee of one company is not a fellow servant to an employee of the second company so the injured Plaintiff may recover. The Court further states that it is the duty of the master to protect his servants against his own negligence, and against all unusual and unexpected dangers known to the master and unknown to the servant.
Fort Wayne and Wabash Valley Traction Company v. Roudebush, Admin. (173 Ind. 57)	1909	Affirmed for Plaintiff	The Plaintiff, an interurban employee, was killed in a collision. A motorman employed by the Defendant (interurban) started a second car moving without making sure the first car had stopped, causing the two cars to collide. The Defendant argued that the Plaintiff should not recover because the injury resulted from the negligence of a fellow servant but he Court disagreed. The Court here finds that interurban railroad company whose negligence coincides with that of a servant in producing a harm is liable. This case also discusses the assumption of risk defense.

CASE	YEAR	WINNER	INFORMATION
Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Sudhoff, Admin. (173 Ind. 314)	1910	Affirmed for Plaintiff	The Plaintiff was killed by a train while working in the rail yard. The train hit the Plaintiff because the engineer driving it disregarded the safety signals and ran on to a side track at full speed. The Defendant (RR company) argued that the Plaintiff should not recover because his injury resulted from the negligent act of another employee, a fellow-servant, but the Court does not agree. The Court finds that the engineer and the Plaintiff are not fellow-servants.
Cleveland, Cincinnati, Chicago and St. Louis Railway Company v. Foland (174 Ind. 411)	1910	Reversed for Defendant	The Plaintiff was struck with timbers and injured while constructing a bridge for Defendant (RR company) under the direction of the railroad's foreman. The foreman ordered stays removed and Plaintiff struck and injured by timbers. The Plaintiff's injury resulted when the foreman ordered stays removed which caused the timbers to fall on the Plaintiff. The Defendant argued that the Plaintiff should not recover because his injuries were the result of a fellow servant's negligence and the Court agreed and barred the Plaintiff's recovery.
Oolitic Stone Company of Indiana v. Ridge (174 Ind. 558)	1910	Affirmed for Plaintiff	Not a railroad case.
Cleveland, Cincinnati, Chicago and St. Louis Railway Company v. Foland (174 Ind. 411)	1910	Defendant (RR) petitions for rehearing & it was denied	Petition denied so not an Indiana Supreme Court ruling.

CASE	YEAR	WINNER	INFORMATION
Richey v. Cleveland, Cincinnati, Chicago and St. Louis Railway Company (176 Ind. 542)	1911	Affirmed for Defendant	The Plaintiff was injured when the Defendant's railroad foreman ordered him to load shovels, picks and other tools upon a hand-car and to go to a certain spot and make repairs. The foreman negligently set brakes which caused the Plaintiff's injury. The Defendant (RR company) argued that the Plaintiff and the foreman were fellow servants and the Court agreed. Dissent – Morris, J. dissents from the opinion as that it holds that the plaintiff's injury was not one arising from the hazards of operating a railroad.
Indiana Union Traction Company v. Long (176 Ind. 532)	1911	Affirmed for Plaintiff	The Plaintiff, an interurban employee, was injured when a car jumped tracks due to defective railroad tie. The Defendant argued that the Plaintiff has no case because another employee of the Defendant (interurban) did not keep the track in good condition and the fellow-servant defense applies. The Court found that an agent to whom a master has delegated the performance of a material duty (like keeping the track in good condition) is a vice-principal and not a fellow servant, so the Plaintiff may recover. The Court explained that this determination depends on what employee does and not his rank, so the Defendant can't say they delegated safety compliance to a fellow employee and use the fellow servant defense to avoid liability for resulting injures. This case also discusses the contributory negligence defense.

CASE	YEAR	WINNER	INFORMATION
Indianapolis Traction and Terminal Company v. Matthews (177 Ind. 88)	1912	Reversed for Defendant	The Plaintiff, an interurban employee, was injured while backing a car out from the Defendant's (RR company) shop because he collided with another car. The Defendant claimed that the driver of the second car is a fellow servant of the Plaintiff so the Plaintiff may not recover. The Court agreed, finding that an employer is bound to exercise ordinary care to furnish his employee a safe place to work and keep it safe, but is not liable to an employee for negligence of fellow servants in the details of the work or in failing properly to use appliances furnished. Negligent actor was a fellow servant so no recovery. The Court also discussed the assumption of risk defense.
Vandalia RR Co. v. Parker (178 Ind. 138)	1912	Reversed for Defendant	The Plaintiff, a section laborer, was injured when he fell from an over-crowded hand car operated by his foreman. The Defendant (RR company) argued that it was not responsible for the Plaintiff's injury because the injury resulted from the negligence of a fellow servant, the foreman. The Court agrees and found that under the common law a section foreman while employing and discharging men is a vice-principal, but in directing them, after their employment, is considered a fellow servant. In this case, the Court found that the foreman was a fellow servant and the fellow-servant defense applies. The Defendant (RR company) was not held liable for the Plaintiff's injuries.

CASE	YEAR	WINNER	INFORMATION
Chicago & Erie RR Co. v. Lain (181 Ind. 386)	1914	Affirmed for Plaintiff	The Plaintiff was crushed between two cars while pushing a car on a track as directed by foreman. The injury occurred because the foreman allowed another car on the same tracks where the Plaintiff was working and that car pushed the cars the Plaintiff was repairing. The Defendant (RR company) claims that foreman is responsible for the Plaintiff's injury and, as he was a fellow-servant, the railroad was not liable. The Court disagrees with the Defendant finding that the foreman and the injured Plaintiff were not fellow servants. This case also discusses the assumption of risk defense.
Vandalia Railroad Company v. Stillwell (181 Ind. 267)	1914	Affirmed for Plaintiff	The Plaintiff, a freight brakeman, was thrown from a moving train car and injured when another car hit his. The Defendant (RR company) argued that the injury resulted from the negligence of the engineer driving the second train and because the engineer is a fellow servant of the Plainitff, he cannot recover. The Court, however, disagreed with the Defendant.
Southern Railroad Company et al. v. Howerton (182 Ind. 208)	1914	Reversed for Defendant (RR)	The Plaintiff, a railroad laborer charged with moving rails from one location to another rode a train over a signal torpedo that exploded and injured the Plaintiff. The Defendant (RR company) claims that the Plaintiff's fellow employee negligently placed the torpedoes on the track and did not tell the Plaintiff so the Defendant was not liable and the Court agreed. The Plaintiff cannot claim against his employer when his injury resulted from the negligence of a fellow-servant. This case also discusses the assumption of risk defense.

CASE	YEAR	WINNER	INFORMATION
Vandalia Railroad Company v. Stringer (182 Ind. 676)	1914	Affirmed for Plaintiff	The Plaintiff, a brakeman, jumped from a moving train car because he believed that he was in danger and was injured. The Plaintiff jumped because a loud boom from buildup in the steam engine made him believe the boiler was going to explode. The Defendant (RR company) argued that the Plaintiff was barred from recover because a fellow servant had failed to clear the steam engine, causing the blow that frightened the Plaintiff. The Court finds that the fellow-servant defense does not apply in this case because the Plaintiff acted as a person of ordinary prudence would.
Evansville & Terre Haute Railroad Comapnay V. Lipking, Admin. (183 Ind. 572)	1915	Affirmed for Plaintiff	The Plaintiff, a car coupler and switchman, was injured while walking between two cars he was attempting to couple to get a part and was hit by another car, ordered onto the track by the railroad foreman. The Defendant (RR company) argued that they were not liable because the injury resulted from the negligence of a fellow servant but the Court does not agree. This case also discusses the assumption of risk and contributory negligence defense.
Chicago & Erie Railroad Company v. Mitchell, Admin. (184 Ind. 383)	1915	Affirmed for Plaintiff	The Plaintiff, a railroad car repairer, was under car on sidetrack when another engineer ran a car upon track without warning him and Plaintiff was killed. Defendant (RR company) claims that the railroad employee responsible for placing the signal flags did not do his job and the fellow-servant rule would preclude recovery but the Court did not agree. The case also discusses the contributory negligence defense.

CASE	YEAR	WINNER	INFORMATION
Chicago & Erie Railroad Company v. Mitchell, Admin. (184 Ind. 588)	1915	Affirmed for Plaintiff	The Court affirms that the common law is no longer in force because of the new workers' compensation rule so the fellow-servant defense, the contributory negligence defense, and the assumption of risk defense are no longer available. Plaintiff, a car repairer, was killed when passing between two cars to reach the bolt house to obtain his tools. Defendant (RR company) was held to be responsible for the Plaintiff's injuries.

APPENDIX B

THE CONTRIBUTORY NEGLIGENCE DEFENSE
1880-1915

CASE	YEAR	WINNER	INFORMATION
The Louisville and Nashville Railroad Company v. Kelly (92 Ind. 371)	1883	Affirmed for Plaintiff	Passenger harmed.
The Terre Haute and Indianapolis Railroad Company v. McMurray (98 Ind. 358)	1884	Affirmed for Plaintiff	The Plaintiff, a brakeman, needed immediate surgical attention when his foot was crushed by train. The train conductor engaged a surgeon and the Defendant railroad company does not want to pay. Trial court ruled they are responsible. Generally, train conductors cannot make contracts with surgeons but this case is different because the facts can broaden an employer's responsibility. Dissenting judge, Zollars, disagrees on the ground that it is not sufficiently shown that the conductor had authority to bind the railroad company by his contract with appellee.

CASE	YEAR	WINNER	INFORMATION
The Indiana Car Company v. Parker (100 Ind. 181)	1885	Affirmed for Plaintiff	The Plaintiff was running a saw in a grooved table and the rope that held the saw back broke and Plaintiff's fingers were severed. The Plaintiff argued that the Defendant's (railroad company) foreman knew of the rope problem and that the company was negligent for purchasing and maintaining faulty machinery and directing employees to work on it. The Court agreed. The Plaintiff was free from negligence.
The Atlas Engine Works v. Randall (100 Ind. 293)	1885	Reversed for Defendant (with costs)	Not a railroad employee.
The Baltimore and Ohio and Chicago Railroad Company v. Rowan (104 Ind. 88)	1885	Affirmed for Plaintiff (with costs)	The Plaintiff, a brakeman, was injured when he was riding on the top of a train and hit a low bridge. The Plaintiff argued that the Defendant (railroad company) was liable because the Defendant knew of the low bridge and the brakeman did not. The Court agreed, stating "[i]t seems to us that a railroad company is, and ought to be, required to construct and maintain its roadway and appendages, and its overhead structures, in such manner and condition that its employee or servant can do and perform all the labors and duties required of him, with reasonable safety."
The Pittsburgh, Cincinnati and St. Louis Railway Company v. Adams (105 Ind. 151)	1886	Reversed for Defendant (with a motion to make complaint more specific)	The Plaintiff, a young section hand, was ordered to go on a construction train and perform odd jobs. Once on the train, the Plaintiff was asked to perform the duties of a brakeman, and while doing so, his pants caught and his foot was crushed. The Defendant argued the Plaintiff failed to show he did not know or could not have discovered the defective rail so the Defendant may not be held liable. The Court agrees, finding for the Defendant.

CASE	YEAR	WINNER	INFORMATION
The Cincinnati, Hamilton and Indianapolis railroad Co. v. Carper (112 Ind. 26)	1887	Reversed for Defendant	Railroad passenger not employee
The Cincinnati, Indianapolis, St. Louis and Chicago Railway Company v. Long, Admin. (112 Ind. 166)	1887	Reversed for Defendant (with costs)	The Plaintiff, an experienced switchman and brakeman, was hit by a train backing up when he stood in the conductor's blind spot. The Defendant argued the Plaintiff was negligent in the performance of his duties and the Court agreed. The Defendant (railroad company) argued they have the right to assume all their employees will act prudently. In the absence of any special circumstances, an experienced switchman, who is proceeding with his customary duties between two tracks, where the observance of care will enable him to perform such duties in safety, can not be said to be so absorbed in his duty as to exempt him from the necessity of exercising care for his own safety, and his failure to do so constitutes contributory negligence. Court finds facts do not present a case for negligence against the Defendant (railroad company). Concurrence by Elliott – "I concur in the conclusion that there was no negligence on the part of the appellant, but dissent from the conclusion that the appellee's intestate was guilty of contributory negligence."

CASE	YEAR	WINNER	INFORMATION
The Louisville, New Albany and Chicago Railway Company v. Wood (113 Ind. 544)	1887	Affirmed for Plaintiff	Not an employee.
The Indianapolis and St. Louis Railway Company v. Watson (114 Ind. 20)	1887	Reversed for Defendant	The Plaintiff, a night watchman, was injured while walking in a dark train yard. The Plaintiff asked for a light and was promised one but the company failed to provide it. The Defendant argued the Plaintiff was negligent for continuing work without a lantern and despite the Court's reluctance to find for the Defendant, they do. This case also discusses the assumption of risk defense.
The Louisville, New Albany and Chicago Railway Company v. Buck, Admin. (116 Ind. 566)	1889	Affirmed for Plaintiff (with costs)	The Plaintiff, a brakeman, was fatally injured while coupling and uncoupling cars because of defective machinery provided by the company. The Defendant claimed that the Plaintiff was negligent because he continued to work with defective tools. The Plaintiff did not know habits of engineer who had control of the train. The Court basically sounds a little sympathetic to the Defendant but says that the jury had sufficient evidence to find the way they did. Affirmed for Plaintiff.
The Louisville, New Albany and Chicago Railway Company v. Sandford, Admin. (117 Ind. 265)	1889	Reversed for Defendant (petition for rehearing denied)	The Plaintiff, a baggage master, worked on a track that he knew to be dangerous and was injured. The Defendant (railroad company) alleged that because he knew of the danger and continued working, he was negligent. The Court does not agree. This case also discusses the assumption of risk defense.

CASE	YEAR	WINNER	INFORMATION
The Cincinnati, Hamilton and Dayton Railroad Company v. McMullen , Admin. (117 Ind. 439)	1889	Affirmed for Plaintiff (with costs)	The Plaintiff, a freight train conductor, died when a handle of an appliance broke and he lost his balance and fell between moving cars. The Defendant (railroad company) contended the Plaintiff was contributorily negligent and that his death was due to negligence of the inspector, which means the fellow servant defense applies but the Court does not agree with either defense and the Plaintiff prevails.
The Brazil Block Coal Company v. Young (117 Ind. 520)	1889	Reversed for Plaintiff (complaint is insufficient)	16 year old was to keep and maintain entrances, avenues, passages and roadways in mine. Plaintiff permitted roof to become insecure. Not a railroad case.
The Brazil Block Coal Company v. Gaffney (119 Ind. 455)	1889	Affirmed for Plaintiff (with costs)	The Plaintiff, a 10 year old, worked for a coal company that used a railroad to transport coal. The Plaintiff was assigned to grease bank-cars when elevated out of mine, which was very dangerous. The Defendant argued that the Plaintiff was negligent in his duties, but the Court ruled that when a company employs a child, they are responsible, even if the child knows in advance that work was dangerous.
The Pennsylvania Company v. O'Shaughnessy, Admin. (122 Ind. 588)	1890	Reversed for Defendant (award a new trial)	Plaintiff, a brakeman, was going to switch cars and took an unsafe path back, when a safe one was available, and was injured. The Defendant (railroad company) argued the Plaintiff was negligent because he disregarded company policy and took an unsafe path. The Court agrees. The Defendant also showed the Plaintiff was aware of the safety policy. The Plaintiff's lack of care was negligent

CASE	YEAR	WINNER	INFORMATION
The Cincinnati, Indianapolis, St. Louis and Chicago Railway Company v. Roesch (126 Ind. 445)	1891	Affirmed for Plaintiff with costs	The Plaintiff, a trackman, was injured while raising level of track with gravel with tools supplied by the Defendant (railroad company). The tools were faulty and the Court deems this to be the cause of the injury. The Defendant argued the Plaintiff was negligent in using these tools but the Court found that an employer must generally provide good tools – the railroad company is not the insurer of all bad, but generally good tools may be assumed. Jury found tools were good and Court did not reverse.
Nall, Admin v. The Louisville, New Albany and Chicago Railway Company (129 Ind. 260)	1891	Reversed for Plaintiff	Same facts as below. Here the Court stated that when an employer orders an employee to do something which involves encountering a risk not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the employee either assumed the increased risk, or is negligent in obeying the order. This case talks more about the fellow-servant defense.
Nall, Admin. v. The Louisville, New Albany and Chicago Railway Company (129 Ind. 268)	1891	Affirmed for Plaintiff (petition for rehearing denied)	The Plaintiff was ordered to go collect some driftwood by his supervisor and was injured in the process. The Defendant (railroad company) argued that the Plaintiff was negligent but the Court did not agree. This case also discusses the fellow-servant defense.

CASE	YEAR	WINNER	INFORMATION
The Pennsylvania Company v. McCormack, Admin. (131 Ind. 250)	1892	Affirmed for Plaintiff with costs	The Plaintiff, a brakeman, was riding on a ladder (attached to trains so brakeman can descend on train and couple and uncouple cars) and giving signals. He was killed when a railroad conductor did not turn the switch and the Plaintiff was thrown from the train. The Defendant alleged the Plaintiff was negligent, but the Court did not agree. There was evidence that showed a problem with the construction of the side track. The Court ruled the Plaintiff was not negligent because he had the right to assume his employer made his workplace safe, unless he had the opportunity to notice the danger, and he did not here.
The Louisville, Evansville and St. Louis Consolidated Railway Company v. Hanning, Admin. (131 Ind. 528)	1892	Affirmed for Plaintiff with costs	Plaintiff, a car repairer who normally worked in a warehouse, was killed while attempting to repair a car on the sidetracks. The Defendant argued that the Plaintiff was negligent because he was trying to repair cars on the side tracks without signal flags. The Plaintiff claimed he was not negligent because he usually repaired cars in a warehouse where signal flags were not necessary. The Court agreed that the Plaintiff was outside his normal duties, he was not negligent. This case also discussed the assumption of risk defense. Dissent – Coffey – no written opinion.
Bier v. The Jeffersonville, Madison and Indianapolis railroad Co. (132 Ind. 78)	1892	Affirmed for Defendant	The Plaintiff, a stone mason, was injured by a negligent bridge carpenter. The Defendant (railroad company) alleged that the Plaintiff was also negligent and should not recover. The Court agreed and permitted the Defendant to evade liability using the fellow-servant defense.

CASE	YEAR	WINNER	INFORMATION
The Lake Erie and Western railroad Co. v. Mugg, Admin. (132 Ind. 168)	1892	Affirmed for Plaintiff	Plaintiff, a car coupler, was injured while coupling two cars because of a defective rail. The Defendant (railroad company) argued that the Plaintiff was negligent in failing to see the defective part. The Court did not agree. The Court held that for the Defendant to prevail in a case like this, it must show that the Plaintiff either knew or should have known about the defective part. Dissent – Coffey – no written opinion.
O'Neal v. The Chicago and Indiana Coal Railway Company (132 Ind. 110)	1892	Affirmed for Defendant	Plaintiff, a young brakeman, was thrown from the train because of its unevenness. The Defendant alleged the Plaintiff did not exercise due care to ensure that he did not fall off the moving train and he was therefore contributorily negligent. The Court agreed because the Plaintiff had ridden that same train before and knew of the circumstances. The condition of the train was open and obvious so the Plaintiff was contributorily negligent.
Clarke v. The Pennsylvania Company (132 Ind. 199)	1892	Affirmed for Defendant	The Plaintiff was injured when a fellow employee (who was his boss) overtook him on his train and the Plaintiff jumped. The Plaintiff alleged that he jumped in response to an imminent danger. The Court ruled that the Plaintiff was not contributory negligence because different standards apply when someone reacts to an imminent danger.
The Ohio and Mississippi Railway Company v. Stansberry (132 Ind. 533)	1892	Affirmed for Plaintiff	Passenger not an employee .

CASE	YEAR	WINNER	INFORMATION
The Louisville, Evansville & St. Louis Consolidated railroad Co. et al v. Utz, Admin. (133 Ind. 265)	1892	Affirmed for Plaintiff	The Plaintiff, a brakeman, was jumping from one car to another when a pin came loose and he fell off and was killed. The Defendant alleged that the Plaintiff's actions were negligent, but the Court found that just became he attempted something dangerous, he is not negligent. The Plaintiff successfully showed that an experienced railroad brakeman would not have known if there was a danger, so he could not be held negligent. The Defendant (railroad company) also argued the Plaintiff was negligent because he was walking on top of a train at a high rate of speed. However, the Court held that was his job, so he cannot be held contributorily negligent.
The Evansville & Terre Haute Railroad Co. V. Duel (134 Ind. 156)	1893	Reversed for Defendant	The Plaintiff, an engine repairman, opened a train throttle valve which cut off steam from the cylinders and the engine moved suddenly injuring him. The Court ruled that the Plaintiff did not show all the elements of negligence and did not sufficiently allege that the master knew of the danger. The Defendant also alleged that the Plaintiff assumed the risk. The Court held that because the employee knew about danger and continued with employment, he accepted the danger.
The Pennsylvania Company v. Sears (136 Ind. 460)	1893	Affirmed for Plaintiff	Plaintiff, a brakeman, was riding on top of a train car and was injured when he hit his head on a low bridge. The Defendant (railroad company) claimed that the Plaintiff was contributorily negligent and that his injury was a danger incident to service. The Court did not agree. The Court also noted there were no warning or lights on bridge.

CASE	YEAR	WINNER	INFORMATION
The Cincinnati, Hamilton and Indianapolis railroad Co. v. Madden (134 Ind. 462)	1893	Affirmed for Plaintiff	The Plaintiff, a track hand who cared for track by cutting weeds, tamping ballasts, and watching for and removing dangers from track, was asked to unload steel rails from a construction train. Another engineer (whom the Defendant knew to be incompetent) jerked his train forward, hitting the Plaintiff, who ended up having to have his legs amputated. The Defendant alleged that the Plaintiff should not have followed the orders of his superior, knowing that the engineer driving the train was incompetent. The Court found that the Plaintiff was not negligent. The Court stated that unless the danger and peril to life and limb in the new service into which Plaintiff was ordered was so glaring that no prudent man would have entered into it, the employee will not be held negligent. General rule is that servant accepts all ordinary dangers, but this does not fit when Plaintiff is asked to step out of ordinary role and do something else.
The New York, Chicago and St. Louis Railroad Company v. Perriguey (138 Ind. 414)	1893	Reversed for Defendant	The Plaintiff, a railroad employee, is injured when he is hit by a train without a headlight. The engineer conducting the train that hit the Plaintiff was supposed to light the hand lamps and did not do so. Despite this, the Court found that the Plaintiff cannot recover because the evidence presented did not establish proximate cause. This case is also decided based upon the fellow-servant defense.

CASE	YEAR	WINNER	INFORMATION
The Louisville, New Albany and Chicago Railway Company v. Berkey, Admin. (136 Ind. 181)	1893	Affirmed for Plaintiff	The Plaintiff, a front brakeman, was killed when he was thrown from the train because of a bad coupling pin. The Defendant (railroad company) claimed that Plaintiff did not follow the rules, but evidence showed Plaintiff did not have rules or know about them so he cannot be held negligent. The evidence also showed that master must have known about the bad pin or must have, with reasonable diligence and attention, been able to know. The Court stated, "[t]he rule appears to be that when it is shown that the master or his agent has placed a defective appliance in the hands of his servant, which occasioned his injury while in the exercise of due care and caution, the burden shifts, and the master is then required to show that he exercised due care in their selection or manufacture." This case is also decided based on the fellow-servant defense.
The Louisville, New Albany and Chicago Railway Company v. Kendall (138 Ind. 313)	1894	Reversed for Plaintiff	Not an employee – railroad passenger.
The Ohio and Mississippi Railway Company v. Dunn (138 Ind. 18)	1894	Reversed for Defendant	The Plaintiff, a fireman who occasionally served as an engineer in a switch yard, was injured while coupling cars when another engineer hit the cars he was coupling. The Defendant argued that the Plaintiff was negligent and the Court agreed. This case is also decided based upon the fellow-servant defense and is a stronger argument here.

CASE	YEAR	WINNER	INFORMATION
The New York, Chicago and St. Louis Railroad Company v. Perriguey (138 Ind. 414)	1894	Reversed for Defendant.	The Plaintiff, a brakeman, was injured when he was thrown from an engine while attempting to relight a lantern. The train had a defective lantern because the wind blew it out frequently leaving the brakemen in darkness. The Defendant (railroad company) argued that the Plaintiff was negligent because he attempted to relight the lantern while the train was moving and the Court agreed. The Court also uses the fellow-servant defense to make its decision.
The Pennsylvania Company v. McCaffrey, Admin. (139 Ind. 430)	1894	Affirmed for Plaintiff	The Plaintiff, a track laborer, was killed when he fell on the track and was run over by a hand car. The Defendant (railroad company) argued that the Plaintiff was contributorily negligent for not moving from the track in time. The Court found that the Defendant was liable because the hand train was being operated by only a fireman and a brakeman against the established rules. When rules are violated, causing an accident, the employer will be held liable.
Indiana, Illinois and Iowa Railway Company v. Snyder, Admin (140 Ind. 647)	1895	Affirmed for Plaintiff	The Plaintiff, a railroad worker, was killed in a collision. The Court found that the Plaintiff was not contributorily negligent.
The Bedford Belt Railway Co. v. Brown (142 Ind. 659)	1895	Reversed for Defendant	The Plaintiff, a railroad construction worker, was injured when some heavy timbers slipped off a car. The Defendant (railroad company) claimed that the Plaintiff was contributorily negligent because he failed to observe if a wedge used to hold the timbers was safe before using it. The Court agreed. This case is also decided based upon the assumption of risk defense because an injured worker cannot bring a claim against his employer if he knew that wedges used in the construction of a track on which heavy timbers are conveyed are likely to slip out of place.

CASE	YEAR	WINNER	INFORMATION
The Pennsylvania Co. v. Finney, Admin. (145 Ind. 551)	1896	Reversed for Defendant	The Plaintiff, a railroad brakeman, was injured when he was climbing down a ladder on the side of the car, facing the car, and fell into danger. The Court found that the Plaintiff is guilty of contributory negligence in descending a ladder at the side of a car with his face toward the car, without looking and in a dangerous place. In order to prevail, a Plaintiff must show both negligence on the part of the master and freedom from negligence on the part of the servant. The Plaintiff could have noticed the danger with ordinary diligence so cannot now claim that master was negligent.
Louisville, New Albany and Chicago Railway Co., v. Howell (147 Ind. 266)	1896	Affirmed for Plaintiff	The Plaintiff was injured when a defective coupling link caused train to break in two. The Defendant (railroad company) argued that the Plaintiff was contributorily negligent because he knew he was using defective couplers but the Court found that the Defendant (railroad company) was at fault because it knew or could have known through inspection that the couplers were defective.

CASE	YEAR	WINNER	INFORMATION
The New York, Chicago and St. Louis railroad. Co. v. Ostman, Admin. (146 Ind. 452)	1896	Reversed for Defendant	The Plaintiff, a locomotive fireman, was looking out the window (as it was his duty to do) and was killed when he hit his head on a pole. The Defendant argued that the Plaintiff was contributorily negligent because he chose to look out the window, knowing that other railroad employees were killed doing this very thing. The Court also pointed out that the Plaintiff was 25 years old and old enough to know better. The Defendant is not held liable because the employee could have known of the danger. Dissent – Howard. "I think that the facts found by the jury show that the company was negligent and that the deceased was free from contributory negligence, and must therefore dissent from the conclusion reached by the court."
Robertson v. The Chicago & Erie Railroad Co. (146 Ind. 486)	1896	Affirmed for Defendant	The Plaintiff, an employee in machine repair shop associated with the railroad, was injured while placing a steam chest on a locomotive. He lifted the steam chest based upon a promise of another and was injured when the other employee did not assist. The Defendant (railroad company) argued that the Plaintiff was contributorily negligent. The Court based on the fellow-servant defense, which was more persuasive.

CASE	YEAR	WINNER	INFORMATION
The Louisville and Nashville railroad Co. v. Kemper (147 Ind. 561)	1897	Reversed for Defendant	The Plaintiff, a railroad laborer, performed odd jobs including loading and unloading freight and moving trains along the track. While moving a car along the track the Plaintiff was injured because the track was damaged. The Defendant argued the Plaintiff was contributorily negligent because he knew the track was damaged. The Court agreed. Defendant also alleged that the Plaintiff assumed the risk associated with his employment because he had performed these tasks for almost a year and knew the condition of the track. The Court stated "[w]here defects connected with a service are open and obvious alike to the master and the servant and the servant voluntarily continues in the service and incurs the hazards of such defects, he thereby assumes the perils thereof and may not recover for injures sustained therefrom." The Court found the assumption of risk defense more powerful.
Young v. Citizen's Street Railroad Company (148 Ind. 54)	1897	Affirmed for Plaintiff	Not a railroad worker but someone working laying a gas pipe next to railroad.
Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Montgomery (152 Ind. 1)	1898	Affirmed for Plaintiff	The Plaintiff, a freight brakeman, was injured in a collision. The Plaintiff argued that he was free from negligence and the accident was caused by the negligence of an engineer. The Court agreed. Part of this case deals with a constitutional challenge to an early version of an Employers' Liability Act (Acts 1893 p. 294 sections 7083-7087; Burns 1894, sections 5206s-5206v). The constitutional challenge fails. This case also deals with a contract provision waiving liability, which the Court found void as against public policy.

CASE	YEAR	WINNER	INFORMATION
The Wabash Railroad Company v. Ray, Admin. (152 Ind. 392)	1898	Reversed for Defendant	The Plaintiff, a freight brakeman, passed over railroad track to couple the cars, caught his foot in one of the open spaces, and was run over and killed by an oncoming train. The Defendant argued that the Plaintiff was contributorily negligent because he placed his foot in the open space. The Court agreed. However, this case is also decided based upon the assumption of risk defense.
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company v. Berry (152 Ind. 607)	1899	Reversed for Defendant	The Plaintiff, a track inspector, was injured when he was hit in the back by a large iron pin from a train running approximately 40 miles per hour. Evidence taken as a whole does not show the Defendant's negligence.
Whitcomb v. Standard Oil Company (153 Ind. 513)	1899	Affirmed for Defendant	The Plaintiff, a car coupler for a railroad operated by Standard Oil, was injured when one of the cars he was attempting to couple was cut loose and kicked onto a switch at a high speed. Evidence showed that the Plaintiff did not know if coupling links were in good condition, and while attempting to fix them did not observe the buffers, which led to his hand being crushed. The Court found that the Plaintiff had worked on coupling cars before and should have known of this risk, and by not taking proper precautions was contributorily negligent. The Court found that Plaintiff's injury flowed from an ordinary danger incident to the business in which he was engaged and which might have been avoided by the exercise of due care.

CASE	YEAR	WINNER	INFORMATION
The Terre Haute and Indianapolis Railroad Company v. Fowler, Admin. (154 Ind. 682)	1900	Affirmed for Plaintiff	The Plaintiff, a conductor of freight trains, was killed when a storm knocked out some of the train tracks and his car ran off the tracks. The Defendant (railroad company) knew of the incident and posted someone to warn oncoming trains, but they did not do so. The Defendant argued that the Plaintiff was contributorily negligent because he ran the train even though previous storms had caused damage to the tracks. However, the Court did not agree and found that because there had been floods before, the Defendant railroad company should have known there might be a problem and were on effective notice. The Court found for the Plaintiff.
City of Fort Wayne v. Christie, Admin. (156 Ind. 172)	1901	Affirmed for Plaintiff	Not a railroad employee.
The Baltimore and Ohio Southwestern Railway Company v. Peterson, Admin. (156 Ind. 364)	1901	Affirmed for Plaintiff	The Plaintiff was repairing and cleaning the railroad tracks in switch yard when he was pushed and kicked backward on the track and was killed by a car. The Defendant (railroad company) argued that the Plaintiff was contributorily negligent because he was not on constant alert or lookout for the approach of a train. The Defendant also argued that the Plaintiff was at fault because he had a cap on and was not paying attention. The Court did not agree.

CASE	YEAR	WINNER	INFORMATION
Indianapolis Union Railway Company v. Houlihan (157 Ind. 494)	1901	Reversed for Defendant	The Plaintiff, a telegraph operator at a railroad crossing, was to keep track of coming and going trains. The Plaintiff crossed the track to get to work and was struck and injured by an oncoming train because he could not see the train because of the posts and overgrown weeds. The Defendant (railroad company) argued that failure to notice these obstructions and take proper precaution was contributory negligence. The Court agreed. This case is also decided based on the fellow-servant defense.
The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Martin, Admin. (157 Ind. 216)	1901	Affirmed for Plaintiff	Plaintiff, a locomotive engineer, was killed in a collision on a common track. The Defendant argued that the Plaintiff was contributorily negligent, as it was an engineer's job to anticipate or know when trains were running. The Court disagreed. The Court ruled that it was the job of the Defendant (railroad company) to make sure two trains were not on same track.
Davis Coal Company v. Polland (158 Ind. 607)	1902	Affirmed for Plaintiff	Not a railroad employee.
The Baltimore and Ohio Southwestern Railway Company v. Jones (158 Ind. 87)	1902	Reversed for Defendant	The Plaintiff, a locomotive engineer running a passenger train, was injured in a collision. The basis of the Court's decision is the fellow-servant defense, but the Defendant also alleged contributory negligence.

CASE	YEAR	WINNER	INFORMATION
Wright v. Chicago, Indianapolis and Louisville Railway Company (160 Ind. 583)	1903	Reversed for Defendant	The Plaintiff, a brakeman, was riding on the train cab and was injured when his leg was caught in the switch while descending the cab to apply the brakes. The Defendant argued that the Plaintiff knew or could have discovered how close the switch was and was contributorily negligent in choosing his method of descending the cab. This case also discussed the assumption of the risk defense.
Baltimore and Ohio Southwestern Railroad Company v. Roberts (161 Ind. 1)	1903	Affirmed for Plaintiff	The Plaintiff, a yard switchman, was injured when lumber fell off a train car because the tracks were too close together. The Court found that the Plaintiff was not contributorily negligent because he did not have a duty to inspect the track to discover the tracks were too close together. This case also discussed the assumption of risk defense.
American Rolling Mill Company v. Hullinger (161 Ind. 673)	1904	Reversed for Defendant	Not a railroad employee.
Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Lightheiser (163 Ind. 247)	1904	Reversed for Defendant	The Plaintiff was knocked down and injured by mail car that was being run backwards in rail yard. The Court determined the Plaintiff could not recover because the Plaintiff did not show a duty of Defendant to have someone posed on both ends of train, lights, etc.

CASE	YEAR	WINNER	INFORMATION
Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Collins (163 Ind. 569)	1904	Reversed for Defendant	The Plaintiff, a freight conductor, was injured when his train car collided with an interurban car. The Defendant argued the Plaintiff was contributorily negligent for not avoiding the accident. The Court agreed.
Chicago, Indianapolis & Louisville Railway Company v. Barnes (164 Ind. 143)	1905	Reversed for Defendant	The Plaintiff, a brakeman, was killed when he got off the train to uncouple two cars and was so distracted by the steam and noise that he could not hear the oncoming train. The oncoming train was a boxcar with a large width projection (and small space between tracks) without lights or bells. The Court found no negligence on the part of the Defendant because no duty arose to provide a safe workplace. The Plaintiff was therefore negligent in going between the two cars. This case also discussed the assumption of risk defense.
Nickey et al v. Steuder (164 Ind. 189)	1905	Reversed for Defendant	Not a railroad, but a sawmill.
City of Indianapolis et al v. Cauley (164 Ind. 304)	1905	Affirmed for Plaintiff	The Plaintiff, an interurban repairman riding on a car on bridge, was injured when the bridge fell pushing the Plaintiff into the White River. The Court held that Defendant must prove contributory negligence. The Defendant (railroad company) knew bridge was in disrepair and used it anyway. Plaintiff did not know. Plaintiff had no knowledge or means of knowledge. The Court ruled that the plaintiff did not know about the bridge, so he cannot be held contributorily negligent.

CASE	YEAR	WINNER	INFORMATION
Buehner Chair Co. v. Feulner, By Next Friend (164 Ind. 368)	1905	Affirmed for Plaintiff	Not railroad employee.
Chicago Terminal Transfer Railroad Company v. Vandenberg et al (164 Ind. 470)	1905	Affirmed for Plaintiff	The Plaintiff, a brakeman, was riding on the engine of the car (as he was required to do) when a switch along the tracks was left partially open and unlocked. The Court found that the Plaintiff could not have discovered through proper care that the switch was open so he cannot be held contributorily negligent.
Grand Trunk Western Railway Company v. Melrose (166 Ind. 658)	1906	Reversed for Defendant	The Plaintiff was injured when a train hit a switch that the railroad company maintained for its box cars. The Court found that the Plaintiff knew of this switch and is therefore contributorily negligent. The Court also found that the Plaintiff did not establish that the failure to maintain the switch was the proximate cause of his injury, so no recovery. The Plaintiff also argued that failure to maintain the switch was negligence per se, but the Court did not agree.
Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Lightheiser 168 Ind. 438	1906	Affirmed for Plaintiff	The Plaintiff, charged with directing incoming trains, was injured when a train backed up without warning. The train that hit the Plaintiff was backed up without a person stationed on the back of the cab as was required. The Defendant (railroad company) argued that the Plaintiff was contributorily negligent because he was charged with directing the trains. The Court did not agree. This case also discussed the assumption of risk defense and the fellow-servant defense.

CASE	YEAR	WINNER	INFORMATION
Chicago & Erie Railroad Company v. Lawrence, Admin. (169 Ind. 319)	1906	Affirmed for Plaintiff	The Plaintiff, a railroad switchman, was standing on the side of a train with a lantern because he was moving an engine with no backing lights and was injured when he fell off the train and was hit by another train. The Defendant (railroad company) argued that the Plaintiff was contributorily negligent because he did not take notice of the position of the other train car. The jury found for the Plaintiff and the Indiana Supreme Court affirmed.
Chicago, Indianapolis & Louisville Railway Company v. Pritchard, Admin. (168 Ind. 398)	1906	Affirmed for Plaintiff	The Plaintiff, charged with loading timbers on train, was pinned on the track by falling timbers and killed by an oncoming train. The Court found that the Plaintiff was not negligent and further stated that the Defendant (railroad company) was required to provide a safe place to work and they did not here.
Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Simons, by Next Friend (168 Ind. 333)	1907	Affirmed for Plaintiff	Not a railroad employee.

CASE	YEAR	WINNER	INFORMATION
New York, Chicago & St. Louis Railroad Company v. Hamlin (170 Ind. 20)	1907	Reversed for Defendant	Plaintiff, a head switchman in charge of directing train cars, was coupling cars when one of the cars had a bolt sticking out further than it was supposed to, and the bolt caught his leg and injured him. Another railroad employee was charged with inspecting the bolts to ensure this did not happen. The Defendant (railroad company) argued that the Plaintiff did not show that his accident was the direct and proximate cause of railroad's negligence. However, the Court found that if Plaintiff had looked he could have discovered the defect, and failure to do so constitutes contributory negligence. The Court also found that the Plaintiff should not have attempted to couple the cars by moving in front of them and that the Plaintiff was negligent because he chose a less safe alternative.
Bedford Quarries Company v. Bough (168 Ind. 671)	1907	Reversed for Defendant	Not a railroad employee.
Indianapolis Street Railway Company v. Kane (169 Ind. 25)	1907	Affirmed for Plaintiff	Interurban. The Plaintiff, a track laborer, was injured when he was hit by a large timber while propping up a foot bridge. The Defendant argued that the Plaintiff was contributorily negligent because he was standing under the large timbers, but the Court found that the Plaintiff was only standing where the foreman ordered. The Court therefore found that the Plaintiff was not negligent. This case also discussed the fellow-servant defense.

CASE	YEAR	WINNER	INFORMATION
Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Ross (169 Ind. 3)	1907	Affirmed for Plaintiff	The Plaintiff, a car coupler, was injured when a conductor (also employed by the Defendant) ordered him to arrange cars on the track and ordered an engineer to back a train car against the ones the Plaintiff was attempting to couple. The Court found the Plaintiff was not contributorily negligent for standing on the track because he was following the orders of the conductor, his superior. This case also discussed the assumption of risk defense, finding that a contract by which the employee assumed all risk of negligence in working upon a railroad was void as against public policy, and was also in violation of the express provision of Section One of the Employers' Liability Act.
Indianapolis Union Railway Company et al. v. Waddington, Administrator (169 Ind. 448)	1907	Affirmed for Plaintiff	The Plaintiff, a brakeman with the Indianapolis Union Railway Company, jumped from a moving train and was killed by another train that was exceeding the speed laws. The Defendant (railroad company) claimed the Plaintiff was contributorily negligent because he jumped from a moving train, but the Court found the Plaintiff was doing his job in the usual manner, so there was no evidence of negligence. This case also discussed the fellow-servant defense, which did not apply either.
Inland Steel Company v. Yedinak, by Next Friend (172 Ind. 423)	1909	Affirmed for Plaintiff	This is not a railroad case. Plaintiff fell asleep and caused his foot to fall asleep but this was not deemed contributory negligence.

CASE	YEAR	WINNER	INFORMATION
Cleveland, Cincinnati, Chicago and St. Louis Railway Company et al. v. Gossett, Admin. (172 Ind. 525)	1909	Affirmed for Plaintiff	The Plaintiff was killed by a train. The Defendant argued that the Plaintiff was aware of the dangers present, but the Court found for the Plaintiff. The Court reasoned that it is the duty of the master to protect his servants against his own negligence, and against all unusual and unexpected dangers known to the master and unknown to the servant.
Cleveland, Cincinnati, Chicago and St. Louis Railway Company v. Morrey, Admin. (172 Ind. 513)	1909	Reversed for Defendant	The Plaintiff, a brakeman in charge of coupling train cars, was killed when front car moved forward and then backed up in the dark without warning or lights. The Defendant (railroad Company) argued that the Plaintiff knew that the engine would be backed up so by staying on the tracks, he was contributorily negligent. The Court stated, "[i]t is a well-settled rule that where the specific facts alleged show a knowledge of danger, or the same opportunities for knowledge as the master has, these allegations will overcome the general allegation of want of knowledge." The Court found that the Plaintiff knew the yard was dark and no lights were on train, so in order to overcome the contributory negligence defense, the Plaintiff must show a duty to keep the rail yard safe or lights on the train, and he did not so. The Court found for the Defendant.

CASE	YEAR	WINNER	INFORMATION
Cleveland, Cincinnati, Chicago and St. Louis Railway Company v. Powers (173 Ind. 105)	1909	Reversed for Defendant	The Plaintiff was hit by a train running off schedule while walking through a train yard. While the train running off schedule is a violation of a safety statute, the Court found that the fact that the Plaintiff knew about the violation meant that he cannot recover for injuries resulting from this violation. The Court maintained that a master is not liable to a servant for injuries caused by defects known to the servant, unless a promise has been made to repair, or some other excuse justifying the servant in remaining in the service. A servant of a railroad company has no right to rely upon the train schedule, or upon the custom of using certain tracks for certain trains. The Court found that the Plaintiff cannot recover.
William Laurie Company v. McCullough (174 Ind. 477)	1910	Reversed for Defendant	Not a railroad employee – department store slip and fall.
Vandalia Coal Company v. Yemm (175 Ind. 524)	1910	Affirmed for Plaintiff	Coal mine employee.
Grand Trunk Western Railway Company v. Poole (175 Ind. 567)	1910	Affirmed for Plaintiff	The Plaintiff, a car coupler, was thrown under a train when coupling two cars together because a switch was left closed. The Defendant (railroad company) argued that the Plaintiff should be held at least partially negligent, but the Court found that the Plaintiff was not responsible for opening the switch, and cannot be found negligent because he believed the switch had been opened. This case also discussed the assumption of risk defense.

CASE	YEAR	WINNER	INFORMATION
Cleveland, Cincinnati, Chicago and St. Louis Railway Company v. Lynn (177 Ind. 311)	1911	Affirmed for Plaintiff	Not an employee – just someone who did not look and listen as required at track.
Indiana Union Traction Company v. Long (176 Ind. 532)	1911	Affirmed for Plaintiff	Interurban. The Plaintiff was injured when a car jumped the tracks due to defective track tie. The Court found that the Defendant (interurban) has a responsibility to keep the track in good repair and the Plaintiff cannot be held liable for operating a car on this track.
Lake Erie and Western Railroad Company v. Hennessey (177 Ind. 64)	1912	Reversed for Defendant (but grant new trial)	The Plaintiff, a car inspector, is injured while lying under a car, when the brake failed on an oncoming car and that car hit the car the Plaintiff was inspecting. The Defendant argued the Plaintiff was contributorily negligent because he did not warn the switchman that he was going to be under the car when he could have used a flag or signal. The Court agreed the Plaintiff was at least partially negligent and therefore bars any recovery for the Plaintiff.
Indiana Union Traction Company v. Abrams (180 Ind. 54)	1913	Affirmed for Plaintiff	The Plaintiff, a motorman in charge of an interurban car, was injured when his air brake failed. The Court determined that operating the interurban car without an air brake did not make the Plaintiff negligent. The Court found the Defendant (interurban company) was negligent for operating a car without a functioning air brake.
Tippecanoe Loan and Trust Company v. Jester (180 Ind. 357)	1913	Reversed for Defendant	Tenant in apartment building rather than employee.

CASE	YEAR	WINNER	INFORMATION
Dickason v. The Indiana Creosoting Company (179 Ind. 640)	1913	Affirmed for Defendant	The Plaintiff, a railroad worker, was injured while measuring the depth of oil in his engine's tank by a gas explosion. The Plaintiff argued the Court should find that the master had a responsibility to install safety measures and that failure to install safety measures led to the explosion and the Plaintiff's resulting injuries. The Court, however, found that the Plaintiff was partially negligent because he did not follow all possible safety precautions, even though he performed his duties in the usual manner. This Plaintiff also argued *res ipsa loquiter* but that argument failed.
Chicago and Erie Railroad Company et al v. Dinius (180 Ind. 596)	1913	Affirmed for Plaintiff	The Plaintiff, a car coupler, was injured while crossing a track when he fell into a hole and was struck by an oncoming train. The injury occurred in an area shared by two railroad companies. The Court found that the Plaintiff was not contributorily negligent, because it was the track that was unsafe and ultimately led to the injury. The Court concluded that the Defendant (railroad company) had a duty to provide a safe workplace and make any risks known to the employee ahead of time. The Plaintiff is not required to inspect the track and look for holes before beginning work, so failure to do so is not considered negligence. The Court also discussed the assumption of the risk defense.
Chicago and Erie Railroad Company v. Lain (181 Ind. 386)	1914	Affirmed for Plaintiff	The Plaintiff was directed by Defendant's foreman to move a car on a switch track. The foreman knew where Plaintiff was and allowed another car on the track. That car pushed against the Plaintiff's car and the Plaintiff was injured. The Court found that the Plaintiff cannot be held negligent because he did not contribute to the accident. The Court also found that the Plaintiff did not assume the risk of this type of injury because he cannot assume that foreman would be negligent.

CASE	YEAR	WINNER	INFORMATION
The Wabash Railroad Company v. Gretzinger, Admin. (182 Ind. 155)	1914	Affirmed for Plaintiff	The Plaintiff, a freight train conductor, was killed when a passenger train collided with his train, which was stationed on a side track. The Plaintiff did not know and had no way of knowing that the switch was opened back up and an accident would occur. The Court concluded that failing to keep the switch closed was not contributory negligence on the part of the Plaintiff. This case also discussed the assumption of risk defense.
Vandalia Railroad Company v. Stillwell (181 Ind. 267)	1914	Affirmed for Plaintiff	Plaintiff, a freight brakeman, was thrown from a railroad car and injured. The Court discussed the federal statute and the bulk of the consideration is whether the federal statute or state common law apply. The Court found the state common law applied. Under the common law, an employee may not recover against an employer if the employee at all contributed to his injuries. The Court found that the engineer conducting the train that hit the Plaintiff's railroad car was responsible for the accident, so the Plaintiff recovers. This Court also discussed the assumption of risk defense, as well as fellow-servant defense.
Childress, Admin., v. Lake Erie and Western Railroad Company (182 Ind. 251)	1914	Reversed for Defendant	Not an employee.
Southern Railway Company et al. v. Howerton (182 Ind. 208)	1914	Reversed for Defendant	Case decided based on the fellow-servant defense, even though the Defendant also alleged that the Plaintiff was contributorily negligent.

CASE	YEAR	WINNER	INFORMATION
Nordyke & Marmon Company v. Whitehead, Administrator (183 Ind. 7)	1914	Affirmed for Plaintiff	The Plaintiff was hauling coal with chain attached to a rope when it broke and struck the Plaintiff, killing him. The Plaintiff argued that the Defendant (railroad company) knew of danger of the brittle rope and did not tell Plaintiff, so he cannot be found to be contributorily negligent. The Court also found that that the Defendant could have found out through regular testing other than just a straight pull that the rope was weak. The Plaintiff cannot be contributorily negligent for using the equipment provided by his employer.
Vandalia Railroad Company v. Stringer 182 Ind. 676	1914	Affirmed for Plaintiff	The Plaintiff, a brakeman, was injured when he leapt from a moving engine in response to a loud blow caused by a buildup of steam in the engine. The Plaintiff, at the time of his injury, was required to ride in the cab of the engine. The loud blast was caused by a water buildup, which the Court found to be the Defendant's fault. The Court determined the Plaintiff's actions were not negligent and that he could recover.
The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Farmers Trust and Savings Company, Administrator 183 Ind. 444	1915	Reversed for Defendant	The Plaintiff, a railroad laborer, was killed while building a railroad track parallel to another track. Evidence showed that the Plaintiff was negligent because he did not take the proper safety precautions and the Court found for the Defendant. This case also discussed jurisdictional concerns and found that this company was engaged in interstate commerce.

CASE	YEAR	WINNER	INFORMATION
The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Farmers Trust and Savings Company, Administrator 183 Ind. 287	1915	Affirmed for Plaintiff	The Plaintiff, a railroad clerk responsible for recording incoming and outgoing cars, was hit and killed when an engine backed over him. The Defendant (railroad company) argued that the Plaintiff was contributorily negligent because it was his duty to know when cars are coming and going. The Court found that the Plaintiff was not negligent as he did not have control over the engine which backed over him. The Court also discussed the assumption of risk defense.
Terre Haute, Indianapolis and Eastern Traction Company v. Weddle, Admin. 183 Ind. 305	1915	Affirmed for Plaintiff	Plaintiff, a section foreman, was placed in charge of moving a work train. He was to go through some security measures first to make sure he did not collide with a passenger train. The Plaintiff's work train collided with a passenger train and the Plaintiff was injured. The Defendant (railroad company) argued that the collision was at least in part the fault of the Plaintiff and his recovery should be barred. The Defendant also maintained that the Plaintiff must accept some of the responsibility (which would bar recovery completely) because he was a foreman and in charge of moving the train. However, this Court found that the Plaintiff was not negligent and could not have avoided the accident because he was not in charge of the moving passenger train.

CASE	YEAR	WINNER	INFORMATION
Evansville and Terre Haute Railroad Company v. Lipking, Admin. (183 Ind. 572)	1915	Affirmed for Plaintiff	Plaintiff , a car coupler, walked between the two cars he was attempting to couple to get a part to fix them and was hit by another car. The railroad foreman ordered the car that hit the Plaintiff onto the track. The Defendant (railroad company) argued that the Plaintiff was contributorily negligent in walking between two cars, while the Plaintiff maintained that he was acting prudently. The Court found that the Defendant did not provide enough evidence that the Plaintiff was negligent. Contributory negligence is an issue for the Defendant to show and this goes to the jury so hard to overturn on appeal because this is a high standard to meet. This case also discusses the assumption of risk defense.
Chicago and Erie Railroad Company v. Mitchell, Admin (184 Ind. 383)	1915	Affirmed for Plaintiff	The Plaintiff, a railroad car repairer, was under a car a on sidetrack when another engineer ran a car upon track without warning him and Plaintiff was killed. Defendant (railroad company) claims that the railroad employee responsible for placing the signal flags did not do his job and the fellow-servant rule would preclude recovery. The Defendant also claimed that the Plaintiff was contributorily negligent because he was under the car without making sure that the proper signal flags were out, but the Court did not agree with the Defendant's contentions and ruled in favor of the Plaintiff.
Chicago and Erie Railroad Company v. Mitchell, Admin. (184 Ind. 588)	1915	Affirmed for Plaintiff	The Court affirmed that the common law is no longer in force because of the new workers' compensation rule, so the fellow-servant defense, the contributory negligence defense and the assumption of risk defense are no longer available. Plaintiff, a car repairer, was killed when passing between two cars to reach the bolt house to obtain his tools. Defendant (railroad company) is responsible for his injuries.

APPENDIX C

THE ASSUMPTION OF RISK DEFENSE
1880-1915

CASE	YEAR	WINNER	INFORMATION
The Baltimore and Ohio and Chicago Railroad Company v. Rowan (104 Ind. 88)	1885	Affirmed for Plaintiff (with costs)	The Plaintiff, a brakeman, hit his head on a low bridge while riding on the top of a train. The Defendant (RR company) argued that the Plaintiff assumed the risk that an accident would occur. The Court found that the Plaintiff did not assume the risk because he did not know how low the bridge was but the Defendant did. The Court said, "[i]t seems to us that a railroad company is, and ought to be, required to construct and maintain its roadway and appendages, and its overhead structures, in such manner and condition that its employee or servant can do and perform all the labors and duties required of him, with reasonable safety."
The Pittsburgh, Cincinnati and St. Louis Railway Company v. Adams (105 Ind. 151)	1886	Reversed for Defendant (with a motion to make complaint more specific)	The Plaintiff, a young section hand, was acting as a brakeman when his pants were caught on the track and a train ran over his foot. The Defendant argued that the Plaintiff had assumed the risk that injury might occur and the Court agreed. The Court explained that the Plaintiff did not prove that he could not discover or did not know of the defective rail which led to the accident.

CASE	YEAR	WINNER	INFORMATION
Wollery, Admin. v. The Louisville, New Albany and Chicago Railway Company (107 Ind. 381)	1886	Affirmed for Defendant	Plaintiff was a passenger and not an employee.
The Louisville, New Albany and Chicago Railway Company v. Frawley (110 Ind. 18)	1886	Affirmed for Plaintiff	The Plaintiff, a railroad coupler, was injured while coupling a car that had different hooks than he was used to. The Defendant argued that the Plaintiff accepted that injury might occur from coupling cars, but the Court did not agree. The Court found that workers, like the Plaintiff, do not assume unusual risks, like unfamiliar coupling hooks, reasoning that an employee who engages in dangerous employment assumes the ordinary risks and perils of the service only. The Court further maintained that defendants cannot claim assumption of risk when they know (or could have known through reasonable investigation) that their employees are immature, lack experience, or could not appreciate the dangers.
The Indianapolis and St. Louis Railway Company v. Watson (114 Ind. 20)	1887	Reversed for Defendant	The Plaintiff, a night watchman, was injured by an oncoming train in a dark railroad yard because he did not have a lantern as he requested and had been promised by the Defendant. The Defendant argued that the Plaintiff did his job, knowing that he did not have a flashlight, and thereby assumed the risk of any injury. The Court found that generally, an employee who continues in the service of his employer, after notice of a defect augmenting the danger, assumes the risk as increased by the defect.

CASE	YEAR	WINNER	INFORMATION
Indiana, Bloomington and Western Railway Company et al. v. Barnhart (115 Ind. 399)	1888	Affirmed for Plaintiff	The Plaintiff was injured when he was hit by a derailed train car. The Defendant argued that the Plaintiff had assumed the risk of injury because he was familiar with the tracks so the Defendant should therefore not be liable. The Court found for the Plaintiff because the track was not safe and there was a state law providing that when one railroad track crosses another, the company that constructed the last track would be liable for unsafe crossings.
The Louisville, New Albany and Chicago Railway Company v. Wright (115 Ind. 378)	1888	Affirmed for Plaintiff	A brakeman hit his head on a low overhead bridge while riding on the top of the train, as required by his job. The Defendant (RR company) argued that the brakeman Plaintiff was responsible because he was aware of the bridge and therefore he assumed the risk of injury. The Court found that the Plaintiff did not assume the risk of injury because the Defendant did not provide enough warning of the low overhead bridge.
The Louisville, New Albany and Chicago Railway Company v. Sandford, Admin. (117 Ind. 265)	1889	Reversed for Defendant (petition for rehearing denied)	The Plaintiff, a baggage master, was injured when a bridge collapsed, causing the train to crash. The Defendant (RR company) argued that the Plaintiff had assumed the risk of insufficient bridges because he had notice that the bridge was in disrepair and the Defendant was therefore not responsible. The Court agreed with the Defendant and denied recovery for the Plaintiff, stating that employees cannot claim damages for injuries if they have notice of the danger and voluntarily continue service.
The Brazil Block Coal Company v. Young (117 Ind. 520)	1889	Reversed for Plaintiff (complaint is insufficient)	The Plaintiff was not a railroad employee. The Plaintiff was a 16 year old charged with maintaining entrances, avenues, passages, and roadways in mine.

CASE	YEAR	WINNER	INFORMATION
Taylor v. The Evansville and Terre Haute Railroad Company (121 Ind. 124)	1889	Reversed for Plaintiff	The Plaintiff, a machinist in a railroad repair shop, was injured when his superior mechanic dropped a heavy piece of iron on the Plaintiff. The mechanic ordered the Plaintiff to help him hold the heavy iron and then let the iron go without warning the Plaintiff. The Defendant (RR company) argued that the Plaintiff had assumed all the risks incident to his service and therefore may not recover damages. The Court held that the Defendant was responsible because the accident was a result of the negligent actions of the Plaintiff's superior and this is not a risk that the Plaintiff assumes. This case also discussed the fellow-servant defense.

CASE	YEAR	WINNER	INFORMATION
Nall, Admin. v. The Louisville, New Albany and Chicago Railway Company (129 Ind. 260)	1891	Reversed for Plaintiff (with costs)	The Plaintiff, a railroad repairman, was injured while attempting to save a falling bridge, under the orders of his superior. The Defendant argued that the Plaintiff had the same opportunity to notice the defect and he assumed the risk of injury by continuing to work. The Court found that the Plaintiff did not assume the risk of injury because attempting to save a falling bridge was not a duty originally contemplated by the Plaintiff. The Court reasons that where the master orders a servant to do something which involves encountering a risk not contemplated in his employment duties, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk or is negligent in obeying the order. The Court established this rule in determining if an employee assumed the risk--if the apparent danger is such that a man of ordinary prudence would not take the risk, the servant acts at his peril, but unless the apparent danger is such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed. This case also discusses the fellow-servant defense.

CASE	YEAR	WINNER	INFORMATION
The Evansville & Terre Haute Railroad Company v. Duel (134 Ind. 156)	1893	Reversed for Defendant	The Plaintiff, a car coupler, injured his hand when a defective throttle valve caused one car to hit another. The Defendant (RR company) argue that the Plaintiff knew of this danger because he was working on the throttle valve at the time of the injury, knew it was not operating properly, and continued with his employment, thereby accepting any resulting injury. The Court agreed with the Defendant, finding that the Plaintiff could not recover because the Plaintiff knew of the danger and could not prove that the Defendant knew of the danger.
Sheets, Admin., etc. v. Chicago and Indiana Coal Railway Company (139 Ind. 682)	1894	Affirmed for Defendant	The Plaintiff, a brakeman, injured his foot when it was stuck in an irregularity along the track and was killed by an oncoming train. The Defendant (RR company) argued that the Plaintiff assumed the risk of injury because he voluntarily went in front of a detached car. The Court found that the Plaintiff assumed the risk of injury and, he therefore received no recovery. This case also discussed the fellow-servant defense.
Evansville and Terre Haute Railroad Co. v. Tohill, Admin., etc. (143 Ind. 49)	1895	Held for Plaintiff	Plaintiff was a passenger and not an employee.

CASE	YEAR	WINNER	INFORMATION
The Louisville and Nashville Railroad Company v. Kemper (147 Ind. 561)	1897	Reversed for Defendant	The Plaintiff was injured while manually moving trains along a damaged track. While moving a car, the Plaintiff slipped and his foot was caught on the track and severed. The Defendant (RR company) argued that the Plaintiff knew of the condition of the track, as he had worked along that same track for over one year, and has therefore assumed the risk of injury. The Court agreed with the Defendant and found that "[w]here defects connected with a service are open and obvious alike to the master and the servant and the servant voluntarily continues in the service and incurs the hazards of such defects, he thereby assumes the perils thereof and may not recover for injures sustained therefrom."
The Wabash Railroad Company v. Ray, Admin. (152 Ind. 392)	1898	Reversed for Defendant	The Plaintiff, a freight brakeman, was injured when his foot became caught in the track, and he was hit by an oncoming train and died. The Defendant (RR company) argued that the Plaintiff assumed the risk of injury because he had worked the same route for some time and was aware of the danger. The Court found that the Plaintiff assumed the risk because the hazard (the open space on the track) was open and obvious to the Plaintiff.
Indiana, Illinois and Iowa Railroad Company v. Bundy (152 Ind. 590)	1899	Affirmed for Plaintiff	The Plaintiff, a brakeman and car coupler, was injured when he caught his foot in an interlocking switch device at night. The Defendant (RR company) argued that the Plaintiff assumed the risk of such injury because he had worked in this same area for some time. The Court disagreed and found that the Plaintiff did not assume the risk because the danger was not open and obvious enough to put a man of ordinary prudence and caution on guard.

CASE	YEAR	WINNER	INFORMATION
The Pennsylvania Company v. Ebaugh (152 Ind. 531)	1899	Reversed for Defendant	The Plaintiff's arm was severed when he attempted to couple two cars in the dark. The Defendant (RR company) argued that the Plaintiff knew, or should have known, about the danger and therefore assumed the risk of injury. The Court agreed.
Louisville, New Albany and Chicago Railway Company v. Wagner (153 Ind. 420)	1899	Affirmed for Plaintiff	The Plaintiff was injured while loading a heavy truck on a flat car when his superior let go of the truck without telling the Plaintiff. The Defendant (RR company) argued that the Plaintiff assumed the risk of such injury. The Court disagreed and found the Defendant liable. The Court reasoned that the Plaintiff could not assume the risk that his superior would act negligently. The Court also found the Plaintiff acted with due care and diligence at the time of the accident. This case also mentioned the fellow-servant defense.
Whitcomb v. Standard Oil Company (153 Ind. 513)	1899	Affirmed for Defendant	The Plaintiff, a car coupler, was injured while attempting to couple two cars. The coupler pins were not in good condition and were not working. The Plaintiff reached inside the coupling mechanism, thereby crushing his hand. Furthermore, the Plaintiff was not made aware of the condition of the coupling mechanism. The Defendant (RR company) argued that the Plaintiff assumed the risk because he was an experienced car coupler and knew of the danger. The Court agreed with the Defendant and reasoned that Plaintiff assumed the risk because he knew or could have known about the condition of the coupling pins and because the injury resulted from a danger ordinary to his job.

CASE	YEAR	WINNER	INFORMATION
Chicago, Indianapolis & Louisville Railway Company v. Glover, Admin. (154 Ind. 584)	1900	Reversed for Defendant	The Plaintiff, a conductor, was killed when the train platform he was standing on hit an embankment and knocked him off. The Defendant (RR Company) argued that the Plaintiff assumed the risk. The Court agreed because the Plaintiff knew of the condition of the track and continued work.
Coyle, Admin. v. Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company (155 Ind. 429)	1900	Affirmed for Defendant	The Plaintiff, a railroad section hand, was riding home from work on his employer's railroad when he was thrown from the train because of a defect in the track. The Defendant (RR company) argued that the Plaintiff assumed the risk because he was riding on a freight train with no caboose or passenger car attached and the Court agreed. This case also discussed the contributory negligence defense.
City of Fort Wayne v. Christie, Admin. (156 Ind. 172)	1901	Affirmed for Plaintiff	The injured party was not a railroad employee.
The Baltimore and Ohio Southwestern Railway Company v. Peterson, Admin. of Estate of Peterson (156 Ind. 364)	1901	Affirmed for Plaintiff	The Plaintiff was killed while repairing and cleaning the tracks in a switch yard by a train running off schedule in violation of a city ordinance. The Defendant (RR company) argued that the Plaintiff assumed the risk of injury when he accepted employment in a hazardous location, but the Court did not agree. The Court found that the Plaintiff cannot assume the risk of the Defendant's nonobservance of a city ordinance. This case also discussed the contributory negligence defense.

CASE	YEAR	WINNER	INFORMATION
Davis Coal Company v. Polland (158 Ind. 607)	1902	Affirmed for Plaintiff	The injured party was not a railroad employee.
Hollingsworth, Admin. v. The Chicago, Indianapolis & Louisville Railway Company (160 Ind. 259)	1902	Affirmed for Defendant	The Plaintiff, a brakeman, died when the train hit a low bridge while he was riding it. The Plaintiff was unaware that the low bridge was approaching because the Defendant (RR company) did not maintain its warning signals. The Defendant argued that the Plaintiff knew of the danger because he had been warned many times and knew many co-workers that were injured in this same manner. The Court agreed with the Defendant, reasoning that the Plaintiff was made aware of the danger and cannot later say that he did not assume the risk.
Wright v. Chicago, Indianapolis and Louisville Railway Company (160 Ind. 583)	1903	Reversed for Defendant	The Plaintiff, a brakeman, was injured while descending from the top of a train cab, when he stepped opposite the switch target and caught his leg on a fan located too close to the track. The fan severed the Plaintiff's leg. The Defendant argued that the Plaintiff assumed the risk of injury because he descended from the cab knowing how close he was to the fan. The Court agreed with the Defendant finding that the Plaintiff knew of the danger and had sufficient time and opportunity for making objections and he therefore cannot recover. The Court seemed reluctant to find for the Defendant but found that the evidence demonstrated the Plaintiff was aware of the danger and thereby assumed the risk of injury.

CASE	YEAR	WINNER	INFORMATION
Consolidated Stone Company v. Morgan, Admin. (160 Ind. 241)	1903	Affirmed for Plaintiff	The injured party was not a railroad employee.
Consumers Paper Company v. Eyer (160 Ind. 424)	1903	Affirmed for Plaintiff	The injured party was not a railroad employee.
Baltimore and Ohio Southwestern Railroad Company v. Roberts (161 Ind. 1)	1903	Affirmed for Plaintiff	The Plaintiff, a yard switchman, was injured by falling lumber while standing next to a freight train car. The Defendant (RR company) argued that the Plaintiff assumed the risk of injury because he worked in a yard where the tracks were not spaced properly to ensure that such an accident would not occur. The Court disagreed. The Court found that the Plaintiff did not assume the risk of injury because he had the right to presume that railroad tracks were a reasonably safe distance from each other. This case also discussed the contributory negligence defense.
Citizens Street Railroad Company v. Jolly (161 Ind. 80)	1903	Reversed for Defendant	The injured party was not a railroad employee, but was a passenger.
American Rolling Mill Company v. Hullinger (161 Ind. 673)	1903	Reversed for Defendant	The injured party was not a railroad employee.

CASE	YEAR	WINNER	INFORMATION
Southern Indiana Railway Company v. Harrell (161 Ind. 689)	1903	Reversed for Defendant	The Plaintiff was injured by a falling stone while taking a break from building a bridge on the jobsite. The Defendant (RR company) argued that the Plaintiff assumed the risk that another employee might act negligently, which could result in the Plaintiff's injury. The Court agrees. The Court found that employees assume the risk of negligence of a fellow employee and the Plaintiff may overcome this assumption only by showing negligence in hiring or selection of those employees. This case also discussed the fellow-servant defense.
Chicago, Indianapolis, & Louisville Railway Company v. Leachman (161 Ind. 512)	1903	Affirmed for Plaintiff	The injured party was not a railroad employee.
Indianapolis & Greenfield Transit Company v. Foreman (162 Ind. 85)	1904	Reversed for Defendant	The Plaintiff, an interurban track repairman, was injured while riding on an employee train car to his worksite. The Defendant (interurban) argued that the Plaintiff assumed the risk of injury by riding on the car. The Court agreed. This case also discussed the fellow-servant defense.
Dill v. Marmon (164 Ind. 507)	1905	Reversed for Defendant	The injured party was not a railroad employee.

CASE	YEAR	WINNER	INFORMATION
Chicago, Indianapolis & Louisville Railway Company v. Barnes (164 Ind. 143)	1905	Reversed for Defendant	The Plaintiff, a brakeman and car coupler, was hit by a boxcar with a large projection and killed while attempting to uncouple cars. The Plaintiff could not hear the approaching train because it had no lights or warning bells and because there was too much steam and noise in the railyard. The Defendant (RR company) argued that the Plaintiff assumed the risk of such injury associated with his job and the Court agreed. The Court explained that the Plaintiffs may only recover if they show that they are ignorant of the risks associated with their job and the Plaintiff did not do so.
City of Indianapolis et al. v. Cauley (164 Ind. 304)	1905	Affirmed for Plaintiff	The Plaintiff, an interurban repairman, was injured when a bridge he was working on collapsed into the White River. The Defendant (RR company) argued that the Plaintiff assumed the risk of injury, but the Court does not agree. The Court explained that the Plaintiff could not assume the risk of injury because he was unaware that the bridge was in disrepair. This case also discussed the contributory negligence defense.
Robertson v. Ford (164 Ind. 538)	1905	Affirmed for Defendant	The injured party was not a railroad employee.

CASE	YEAR	WINNER	INFORMATION
Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Nicholas (165 Ind. 679)	1906	Affirmed for Plaintiff	The Plaintiff, a brakeman, was ordered by the conductor (his superior) to put his train onto the track and stop it at a certain place on the track. The conductor, after giving this order, negligently failed to cut the car loose. When the Plaintiff applied the brake he was thrown off the train and injured. The Defendant (RR company) argued that the Plaintiff had assumed the risk of injury because he knew his job was dangerous, yet continued employment. The Court does not agree. The Court reasoned that the Plaintiff cannot be held to have assumed the risk of injury because he was following orders and could not have anticipated the danger inherent in these actions. The Court further explained that assumption of the risk defense rests on the idea of a voluntary action and here the Plaintiff was following orders.
Grand Trunk Western Railway Company v. Melrose (166 Ind. 658)	1906	Reversed for Defendant	The Plaintiff was injured when the train he was working on hit a box another employee had left on the track and the train derailed. The Defendant (RR company) argued that the Plaintiff assumed the risk of injury and the Court agreed. The Court did not agree with the Plaintiff's argument that the assumption of risk defense did not apply because the Defendant knew of the danger and did not use a safety device to protect from such injury. The Court reasoned that there was no legal duty to use a safety device, so the Plaintiff assumes the risk.

CASE	YEAR	WINNER	INFORMATION
Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Lightheiser (168 Ind. 438)	1906	Affirmed for Plaintiff	The Plaintiff was hit by a train while directing the traffic at a rail station, when the engineer in control of one of the cars backed his car up without stationing anyone at the rear of the cab. The Defendant (RR company) argued that the Plaintiff assumed the risk of injury resulting from another employee's negligence, but the Court did not agree, finding that railroad employees cannot assume the risk of persons in charge of signal or telegraph offices, switch yards, shops, round-houses, locomotive engines, trains upon a railway, or of others in authority, since they are treated as vice-principals and not as fellow servants. This case also discussed the fellow-servant defense and the contributory negligence defense.
Chicago & Erie Railroad Company v. Lawrence, Admin. (169 Ind. 319)	1906	Affirmed for Plaintiff	The Plaintiff, a switchman, was standing on the back of a train holding a lantern because the train had no backing light, when the conductor hit another train, causing the Plaintiff to fall to his death. The Defendant (RR company) argued that the Plaintiff assumed the risk of injury, but the Court did not agree. The Court reasoned that employees may not assume the risk that their employer will violate a specific duty imposed by statute or municipal ordinance. This case also discussef the contributory negligence defense.
Indianapolis Traction & Terminal Company v. Kidd (167 Ind. 402)	1906	Affirmed for Plaintiff	The injured party was not a railroad employee.

CASE	YEAR	WINNER	INFORMATION
Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Simons, by Next Friend (168 Ind. 333)	1907	Affirmed for Plaintiff	The injured party was not a railroad employee.
Indianapolis Street Railway Company v. Kane (169 Ind. 25)	1907	Affirmed for Plaintiff	The Plaintiff, an interurban track repair man, was hit by a large timber and injured while attempting to prop up a collapsed foot bridge under the orders of his foreman. The Defendant argued that the jury instructions were not followed because the lower court instructed the jury that a person who is hired to do railroad track repair assumes all the ordinary risks of employment and cannot rely on the employer to provide a flawless workplace. Despite these instructions, the lower court found for the Plaintiff. This Court saw no reason to overturn the ruling. This case also discussed the fellow-servant and contributory negligence defenses.
Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Ross (169 Ind. 3)	1907	Affirmed for Plaintiff	The Plaintiff, a car coupler, was injured when a conductor negligently ordered another engineer to back against the cars the Plaintiff was attempting to couple. The Defendant argued that the Plaintiff had signed a contract stating that he assumed all the risk incident to his employment, but the Court refused to enforce this contract, holding as it was against public policy.

CASE	YEAR	WINNER	INFORMATION
Fort Wayne and Wabash Valley Traction Company v. Roudebush, Admin. (173 Ind. 57)	1909	Affirmed for Plaintiff	The Plaintiff, an interurban repairman, was killed when the car he was working with collided with a second car. The conductor of the second car started moving before looking to make sure the first car was not in the way. The Defendant (interurban) argued that the Plaintiff assumed the risk of injury, but the Court did not agree. The Court held that Plaintiff cannot assume the risk that a fellow employee will act negligently, nor could the Plaintiff assume the risk created by the Defendant's failure to observe a statute. The Court further held that the Plaintiff cannot be held to have assumed the risk because he did not know and could not have discovered this particular risk, reasoning that a servant assumes only those risks known to him, including when such risks arise from the master's negligence.
Cleveland, Cincinnati, Chicago and St. Louis Railway Company v. Morrey, Admin. (172 Ind. 513)	1909	Reversed for Defendant	The Plaintiff, a brakeman in charge of coupling cars in a dark train yard, was killed when the conductor of the train he was riding on top of moved forward for water and then backed up without warning, throwing the Plaintiff from the train. The Defendant (RR company) argued that the Plaintiff knew the car would back up after going forward for water, so he assumed the risk when he chose to remain on top of the train. The Court agreed with the Defendant, finding that the Plaintiff had the same opportunity to avoid the accident as the Defendant and he therefore assumed the risk. The Plaintiff was aware of the conditions in the train yard and chose to continue work.

CASE	YEAR	WINNER	INFORMATION
Lake Shore and Michigan Southern Railway Company v. Johnson (172 Ind. 548)	1909	Reversed for Defendant	The Plaintiff fell and was injured while walking on an employee path alongside the tracks when loose dirt caused the path to deteriorate. The Defendant (RR company) argued that the Plaintiff assumed the risk because he knew of the condition of the path and used it anyway. The Court agreed, even though the Plaintiff showed that the Defendant also knew of the loose dirt.
Cleveland, Cincinnati, Chicago and St. Louis Railway Company v. Powers (173 Ind. 105)	1909	Reversed for Defendant	The Plaintiff was injured walking through the train yard in a dense fog when he was hit by a train that was running off schedule. The Defendant (RR company) argued that the Plaintiff assumed the risk of injury by walking in a dark train yard, but the Court did not agree because the Plaintiff was taking the only path available. The Court, however, ultimately found for the Defendant on other grounds.
William Laurie Company v. McCullough (174 Ind. 477)	1910	Reversed for Defendant	The injured party was not a railroad employee. .
Oolitic Stone Company of Indiana v. Ridge (174 Ind. 588)	1910	Affirmed for Plaintiff	The injured party was not a railroad employee.
Vandalia Coal Company v. Yemm (175 Ind. 524)	1910	Affirmed for Plaintiff	The injured party was not a railroad employee.

CASE	YEAR	WINNER	INFORMATION
Grand Truck Western Railway Company v. Poole (175 Ind. 567)	1910	Affirmed for Plaintiff	The Plaintiff, a car coupler, was thrown under a train while coupling two cars because another employee did not move the switch like he was supposed to. The Defendant (RR company) argued that the Plaintiff assumed the risk of injury, but the Court did not agree.
Cleveland, Cincinnati, Chicago and St. Louis Railway Company v. Lynn (177 Ind. 311)	1911	Affirmed for Plaintiff	The injured party was not a railroad employee.
Bennett, Admin. v. Evansville and Terre Haute Railroad Company et al. (177 Ind. 463)	1911	Affirmed for Defendant	The Plaintiff, a member of a bridge gang, was killed when a large pile of dirt was dropped on him. The Defendant (RR company) argued that the Plaintiff assumed all risks of danger ordinarily incident to his work and the Court agreed. The Court reasoned that it is not the hazard itself that creates liability, but rather the failure of the employee to appreciate the danger of the hazard. The Court found that the Plaintiff knew his job was dangerous and proceeded despite the danger and he thereby accepted the risk associated with the job.
Indianapolis Traction and Terminal Company v. Matthews (177 Ind. 88)	1912	Reversed for Defendant	The Plaintiff, an interurban employee, was injured when his car collided with another car that was backing up. The Defendant (interurban) argued that the Plaintiff accepted the risk and the Court agreed. The Court found that even if the Plaintiff did not know of this potential danger, as he claimed, he could have discovered this danger by the exercise of ordinary care and he is therefore liable for all resulting injuries. This case also discussed the fellow-servant defense.

CASE	YEAR	WINNER	INFORMATION
Vandalia Railroad Company v. Parker (178 Ind. 138)	1912	Reversed for Defendant	The Plaintiff, a section laborer, was injured when he fell from an overcrowded hand car operated by the Defendant's foreman. The Defendant (RR company) argued that the Plaintiff assumed the risk of injury and the Court agreed. The Court reasoned that the Plaintiff assumed the risk because he could have discovered the danger of riding on an overcrowded hand car by the exercise of ordinary care.
Wabash Railroad Company et al. v. Priddy et al. (179 Ind. 483)	1913	Reversed for Defendant	The injured party was not a railroad employee.
Chicago and Erie Railroad Company et al. v. Dinius (180 Ind. 596)	1913	Affirmed for Plaintiff	The Plaintiff was injured while coupling cars when he fell into a hole while crossing the track. The Defendant (RR company) argued that the Plaintiff assumed the risk of injury when he crossed in front of a moving train, but the Court disagreed. The Court reasoned that the Defendant was required to provide a safe workplace and to make risks like these known to workers, and it did not do so.
Chicago & Erie Railroad Company v. Lain (181 Ind. 386)	1914	Affirmed for Plaintiff	The Plaintiff was injured while pushing an out of order railroad car along the tracks, as directed by the Defendant's foreman, when another car was allowed on the same tracks, hitting the Plaintiff's car. The Defendant (RR company) argued that the Plaintiff assumed the risk because he knew of the dangers of the job. The Court disagreed. The Court maintained that the Defendant had a duty to provide a safe workplace and because it did not do so, the employee cannot assume the risk of injury.

CASE	YEAR	WINNER	INFORMATION
The Wabash Railroad Company v. Gretzinger, Admin. (182 Ind. 155)	1914	Affirmed for Plaintiff	A switch was left open by the Defendant's employee and when the Plaintiff, a freight train conductor, was killed when a passenger train collided with the Plaintiff's train while the Plaintiff's train was stationed on a side track. The Defendant (RR company) argued that the Plaintiff assumed the risk, but the Court disagreed, finding that the Plaintiff did not know and had no way of finding out that the switch was open on his track and that an accident would occur. Furthermore, the Court reasoned that the Defendant allowed passenger trains on its tracks to exceed the speed limit established by a city ordinance and the Plaintiff cannot assume risk from injuries resulting from another's failure to observe established ordinances.
Vandalia Railroad Company v. Stillwell (181 Ind. 267)	1914	Affirmed for Plaintiff	Plaintiff, a freight brakeman, was thrown from a railroad car and injured. The Court discussed the federal statute and the bulk of the consideration is whether the federal statute or state common law applies. The Defendant (RR company) argued that the Plaintiff assumed the risk of the accident but the Court did not agree. The Court found that, because there was a statutory violation, the Plaintiff cannot be held to have assumed the risk that results from this violation. This Court also discussed the contributory negligence and the fellow-servant defenses.

CASE	YEAR	WINNER	INFORMATION
Southern Railway Company et al. v. Howerton (182 Ind. 208)	1914	Reversed for Defendant (RR) and new trial granted	The Plaintiff, a track laborer, was injured while transporting rails from one place to another. He worked on a track where Defendant (RR company) placed highly explosive signal torpedoes, but he was not aware of the danger. The Plaintiff ran over a torpedo which exploded and injured his right leg. The Defendant (RR company) claimed that Plaintiff assumed the risk of injury and the Court agreed. The Court found that Plaintiff should have known about the torpedoes and that he was injured while riding on a car with his legs inappropriately out of the train. Also, the employee usually wore glasses and did not do so this day.
Chicago and Eastern Illinois Railrod Company v. Conrad (182 Ind. 173)	1914	Reversed for Plaintiff	The Plaintiff was injured when he fell off the Defendant's railroad crossing. The Defendant (RR company) argued that the Plaintiff assumed the risk of injury, but the Court did not agree. The Court found that the Plaintiff could not have assumed the risk of injury because there was no reason for the Plaintiff to believe that the crossing was not safe.
Nordyke & Marmon Company v. Whitehead, Admin. (183 Ind. 7)	1914	Affirmed for Plaintiff	The Plaintiff was hauling coal with a chain attached to a rope when the chain broke and struck the Plaintiff, killing him. The Plaintiff argued that the Defendant (railroad company) knew of the danger of the brittle rope and did not tell Plaintiff, so he cannot be found to have assumed the risk. The Court agreed. The Court also found that that the Defendant could have discovered through regular testing that the chain was weak. This case is decided more on the contributory negligence defense.

CASE	YEAR	WINNER	INFORMATION
The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Farmers Trust and Savings Company, Admin. (183 Ind. 287)	1915	Affirmed for Plaintiff	The Plaintiff, a railroad laborer, was killed while building a railroad track parallel to another track, when a train running off schedule and without warning signals hit him. The Defendant (RR company) argued that the Plaintiff assumed the risk of injury, but the Court did not agree because the Defendant offered no evidence that the Plaintiff either knew or could have known about the approaching train. Evidence showed that the Plaintiff was negligent because he did not take the proper safety precautions and the Court found for the Defendant. This case also discussed jurisdictional concerns and found that this company was engaged in interstate commerce.
Evansville and Terre Haute Railroad Company v. Lipking, Admin. (183 Ind. 572)	1915	Affirmed for Plaintiff	The Plaintiff, a car coupler, walked between the two cars he was attempting to couple to retrieve a part and was hit by another car. The railroad foreman ordered the car that hit the Plaintiff onto the track. The Defendant (railroad company) argued that the Plaintiff assumed the risk of injury because he was performing a dangerous job. The Court found that the Defendant did not provide enough evidence that the Plaintiff assumed the risk. The Court further held that the Plaintiff could not have assumed the risk because the Plaintiff had no way of knowing the foreman would not exercise ordinary caution.
Chicago and Erie Railroad Company v. Mitchell, Admin. (184 Ind. 588)	1915	Affirmed for Plaintiff	The Plaintiff, a railroad car repairer, was under a car on a sidetrack when another engineer ran a car upon the track without warning him and killed the Plaintiff. The Defendant (railroad company) claimed that the Plaintiff assumed the risk of injury when he agreed to repair cars on the track, but the Court did not agree, finding that the Plaintiff could not be held to assume the risk that another employee would place a car upon a track with no signal flags or warnings. This case also discussed the contributory negligence defense.

WORKS CONSULTED

Primary Sources

Artman, Samuel R., "Co-operation of Employers with the Industrial Board of Indiana on Compensation and Accident Prevention." Paper presented at the Second Annual Convention of the Indiana Manufacturers Association, Claypool Hotel, Indianapolis, December 8, 1915. Indiana State Library, Indianapolis.

Bullock, Henry W. "Workmen's Compensation" (paper presented at the Indiana Bar Association, Indianapolis, Indiana, July 10, 1913). Indiana State Library, Indianapolis.

Cooley, Thomas M. *A Treatise on the Law of Torts,* ed. John Lewis. (Chicago: Callaghan & Company, 1907.

Henderson, Charles Richmond. *Industrial Insurance in the United States.* Chicago: University of Chicago Press, 1909.

Indiana Bar Association. "Employers' Liability: Reports of Committee on Jurisprudence and Law Reform, and of the Special Legislative Committee." Paper presented at the Indiana Bar Association, Indianapolis, Indiana, July 11, 1911. Indiana State Library, Indianapolis.

Taylor, Charles W. *The Bench and Bar of Indiana.* Indianapolis, 1895.

United States Public Documents

U.S. Constitution.

U.S. Statutes at Large, 1908.

Indiana Public Documents

Indiana Yearbook, 1917.

Indiana Yearbook, 1918.

Indiana Yearbook, 1920.

Indiana Yearbook, 1921.

Laws of the State of Indiana, 1881 (Indianapolis, 1881).

Laws of the State of Indiana, 1883 (Indianapolis, 1883).

Laws of the State of Indiana, 1891 (Indianapolis, 1891).

Laws of the State of Indiana, 1901 (Indianapolis, 1901).

Laws of the State of Indiana, 1911 (Indianapolis, 1911).

Laws of the State of Indiana, 1915 (Indianapolis, 1915).

Laws of the State of Indiana, 1917 (Indianapolis, 1917).

Laws of the State of Indiana, 1919 (Indianapolis, 1919).

Secondary Sources

Asher, Robert,. "Failure and Fulfillment: Agitation for Employers' Liability Legislation and the Origins of Workmen's Compensation in New York State, 1876-1910." *Labor History* 24 (Spring 1983): 198-222.

Berman, Daniel M. *Death on the Job: Occupational Health and Safety Struggles in the United States.* New York: Monthly Review Press, 1978.

Berkowitz, Edward and Kim McQuaid. *Creating the Welfare State: The Political Economy of Twentieth-Century Reform.* New York: Praeger, 1988.

Brinkley, Alan. *The Unfinished Nation: A Concise History of the American People.* New York: McGraw-Hill, Inc., 1993.

Calbresi, Guido. *The Costs of Accidents: A Legal and Economic Analysis.* New Haven, Conn.: Yale University Press, 1970.

Castrovinci, Joseph. "Prelude to Welfare Capitalism: The Role of Business in the Enactment of Workmen's Compensation Legislation in Illinois, 1905-12." *Social Service Review* 50 (March 1976): 80-102.

Chandler, Alfred D. *The Visible Hand: The Managerial Revolution in American Business*. Cambridge, Mass.: Harvard University Press, 1977.

Clawson, Dan. *Bureaucracy and the Labor Process: The Transformation of U.S. Industry, 1860-1920.* New York: Monthly Review Press, 1980.

Colton, Joel and Stuart Bruchey, eds. *Technology, Economy, and Society.* New York: Columbia University Press, 1987.

Eastman, Crystal. *Work Accidents and the Law.* New York: Arno, 1969.

Ely, James W. *Railroads and American Law.* Lawrence: University Press of Kansas, 2001.

Epstein, Richard. "The Historical Origins and Economic Structure of Workers' Compensation Law." *Georgia Law Review* 16 (Summer 1982): 775-819.

Fogel, Robert W. *Railroads and American Economic Growth: Essays in Economic History.* Baltimore: Johns Hopkins University Press, 1964.

Friedman, Lawrence M. *American Law: An Introduction.* New York: W.W. Norton & Company, Inc., 1984.

Friedman, Lawrence M., and Jack Ladinsky. "Social Change and the Law of Industrial Accidents" in *American Law and the Constitutional Order* ed. by Lawrence M. Friedman and Harry Schieber. Cambridge, Mass.: Harvard University Press, 1978.

Fleming, Donald and Bernard Bailyn, eds. *Law in American History.* Boston: Little, Brown & Company, 1971.

Gilmore, Grant. *The Ages of American Law.* New Haven, Conn.: Yale University Press, 1977.

Gray, Ralph D., ed. *Indiana History: A Book of Readings.* Indianapolis: Indiana University Press, 1994.

Gregory, Charles O. "Trespass to Negligence to Absolute Liability." *Virginia Law Review* 37 (1951): 359-370.

Hall, Kermit F. *The Magic Mirror: Law in American History.* New York: Oxford University Press, 1989.

Holmes, Oliver Wendell, Jr. "The Common Law." In *Perspectives on Tort Law,* 4th ed., edited by Robert L. Rabin. New York: Little, Brown and Company, 1995.

Horwitz, Morton J. *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy.* New York: Oxford University Press, 1992.

Hurst, James Willard. *Law and the Conditions of Freedom in the Nineteenth-Century United States.* Madison: University of Wisconsin Press, 1956.

Kantor, Shawn Everett and Price V. Fishback. "The Adoption of Workers' Compensation in the United States, 1900-1930." *Journal of Law & Economics* 61 (October 1998): 305-335.

Kantor, Shawn Evertt and Price V. Fishback. "Nonfatal Accident Compensation and the Common Law at the Turn of the Century." *Journal of Law, Economics & Organization* 11(April 1995): 406-433.

Kantor, Shawn Evertt and Price V. Fishback. "Did Workers Pay for the Passage of Workers' Compensation Laws?" *Quarterly Journal of Economics* 110 (August 1995): 713-742.

Kantor, Shawn Evertt and Price V. Fishback. "The Durable Experiment: State Insurance of Workers' Compensation Risk in the Early Twentieth Century." *Journal of Economic History* 56 (December 1996): 809-836.

Kantor, Shawn Evertt and Price V. Fishback. "Precautionary Savings, Insurance, and the Origins of Worker's Compensation." *Journal of Political Economy* 104 (April 1996): 419-442.

Kantor, Shawn Evertt and Price V. Fishback. "'Square Deal' or Raw Deal? Market Compensation for Workplace Disamenities, 1884-1903." *Journal of Economic History* 52 (December 1992): 826-848.

Kantor, Shawn Evertt and Price V. Fishback. "Coalition Formation and the Adoption of Workers' Compensation: The Case of Missouri, 1911 to 1926" in Claudia Goldin and Gary D. Libecap, eds., *The Regulated Economy: A Historical Approach to Political Economy.* Chicago: University of Chicago Press, 1994.

Katz, Michael B. *In the Shadow of the Poorhouse: A Social History of Welfare in America.* New York: Basic Books, 1986.

Kennedy, Jay B. *Protective Labor Legislation in Indiana.* Unpublished Ph.D. thesis, Indiana University, 1961.

Kim, Seung-Wook and Price V. Fishback. "Institutional Change, Compensating Differentials, and Accident Risk in American Railroading, 1892-1945." *Journal of Economic History* 53 (December 1993): 796-823.

Kolko, Gabriel. *Railroads and Regulation, 1877-1916.* Princeton, N.J.: Princeton University Press, 1965.

Landes, M. and Richard A. Posner. *The Economic Structure of Tort Law.* Cambridge, Mass.: Harvard University Press, 1987.

Laurie, Bruce. *Artisans into Workers.* New York: Hill and Wang, 1989.

Levy, Leornard W. *The Law of the Commonwealth and Chief Justice Shaw.* Cambridge, Mass.: Harvard University Press, 1957.

Licht, Walter. *Industrializing America: The Nineteenth Century.* Baltimore: Johns Hopkins University Press, 1995.

Lubove, Roy. "Workmen's Compensation and the Prerogatives of Volunteerism." *Labor History* 8 (Fall 1967): 254- 279.

Madison, James M. *The Indiana Way: A State History.* Indianapolis: Indiana University Press, 1990 [1986].

Orren, Karen. *Belated Feudalism: Labor, the Law, and Liberal Development in the United States.* Cambridge, Eng.: Cambridge University Press, 1991.

Pavalko, Eliza. "State Timing of Policy Adoption: Workmen's Compensation in the United States, 1909-1929." *American Journal of Sociology* 95 (November 1989): 593-615.

Phillips, Clifton, J. *Indiana in Transition: The Emergence of an Industrial Commonwealth, 1880-1920.* Indianapolis: Indiana Historical Bureau, 1968.

Posner, Richard A. "Noble Laureate: Ronald Coase and Methodology." *Journal of Economic Perspectives* 7 (Autumn 1993): 195-210.

Posner, Richard A. *The Economics of Justice.* Cambridge, Mass.: Harvard University Press, 1981.

Posner, Richard A. *Economic Analysis of Law.* Boston: Little, Brown & Co., 1992.

Posner, Richard A. "A Theory of Negligence." *Journal of Legal Studies* 1 (January 1972): 29-48.

Rabin, Robert L. "The Historical Development of the Fault Principle: A Reinterpretation," *Georgia Law Review* 15 (1981): 925-963.

Rabin, Robert L. "Some Reflections on the Process of Tort Reform." *San Diego Law Review* 25 (1988): 13-44.

Schoene, Lester and Frank Watson. "Workmen's Compensation on Interstate Railways." *Harvard Law Review* 47 (January 1934): 389-424.

Stanton, Robert H. and Gina M. Hicklin. "This History of the Court of Appeals of Indiana." *Indiana Law Review 30* (1997): 203-231.

Tindall, George Brown and David Emory Shi. *America: A Narrative History,* 4th ed. New York: Hill and Wang, 1982.

Tomlins, Christopher L. *Law, Labor, & Ideology in the Early American Republic.* Cambridge, Eng.: Cambridge University Press, 1993.

Tomlins, Christopher L. *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960.* Cambridge, Eng.: Cambridge University Press, 1985.

Trachtenberg, Alan. *The Incorporation of America: Culture and Society in the Gilded Age.* New York: Hill and Wang, 1982.

Tripp, Joseph. "An Instance of Labor and Business Cooperation: Workmen's Compensation in Washington State." *Labor History* 17 (Fall 1976): 530-550.

Urofsky, Melvin I. "State Courts and Protective Legislation During the Progressive Era: A Reevaluation." *Journal of American History* 72 (June 1985): 63-91.

Vatter, Harold G., "Technological Innovation and Social Change in the United States, 1870-1980," in *Technology, the Economy, and Society*, ed. Joel Colton and Stuart Bruchey. New York: Columbia University Press, 1987.

Weinstien, James. "Big Business and the Origins of Workmen's Compensation." *Labor History* 8 (Spring 1967): 156-174.

Weiss, Harry. "Employers' Liability and Workmen's Compensation," in John Rogers Commons, et al., ed. *History of Labour in the United States.* New York: A.M. Kelley, 1966 [1935].

Wesser, Robert F. "Conflict and Compromise: The Workmen's Compensation Movement in New York, 1890s–1913." *Labor History* 12 (Summer 1971): 341-372.

White, G. Edwards. *Tort Law in America: An Intellectual History.* New York: Oxford University Press, 1980.

Wiebe, Robert. *The Search for Order, 1877-1920.* New York: Hill & Wang, 1976.

Witt, John Favian. "Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First Party Insurance Movement." *Harvard Law Review* 114 (January, 2001): 690-841.

TABLE OF CASES

Indiana Union Traction Company v. Long, 176 Ind. 532 (1911).

Indiana, Bloomington and Western Railway Company et al. v. Barnhart, 115 Ind. 399 (1888).

The Indianapolis and St. Louis Railway v. Johnson, 102 Ind. 352 (1885).

The Indianapolis and St. Louis Railway Company v. Watson, 114 Ind. 20 (1887).

Ives v. South Buffalo Ry. Co., 94 N.E. 431 (1908).

The Lake Erie and Western Railroad Company v. Mugg, Admin., 132 Ind. 168 (1892).

The Louisville and Nashville Railroad Company v. Kemper, 147 Ind. 561 (1897).

The Louisville and St. Louis Consolidated Railroad Company et al. v. Utz, Admin., 133 Ind. 265 (1892).

Louisville, Evansville and St. Louis Railway Consolidated Railroad Company v. Miller, Admin., 140 Ind. 685 (1895).

Louisville, New Albany and Chicago Railway Company v. Heck, Admin., 151 Ind. 229 (1898).

The Louisville, New Albany and Chicago Railway Company v. Sandford, Admin., 117 Ind. 265 (1899).

The Louisville, New Albany and Chicago Railway Company v. Frawley, 110 Ind. 18 (1886).

Kerner, Admin. v. The Baltimore and Ohio Southwestern Railway Company, 149 Ind. 21 (1897).

Mountain Timber Co. v. State of Washington, 243 U.S. 219 (1917).

Murray v. South Carolina Railroad 1 McMullen 385 (South Carolina, 1841).

New York Central Rail Co. v. White, 243 U.S. 188 (1917).

The New York, Chicago and St. Louis Railroad Company v. Hamlin, 170 Ind. 20 (1907).

The New York, Chicago and St. Louis Railroad Company v. Ostman, Admin., 146 Ind. 452 (1896).

O'Neal v. The Chicago and Indiana Railway Company, 132 Ind. 110 (1892).

The Pennsylvania Company v. O'Shaughnessy, Admin., 122 Ind. 588 (1890).

The Pennsylvania Company v. Finney, Admin., 145 Ind. 551 (1896).

The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co. v. Sudhoff, Admin., 173 Ind. 314 (1910)

The Pittsburgh, Cincinnati and St. Louis Railway Company v. Adams, 105 Ind. 151 (1886).

Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Lightheiser, 163 Ind. 247 (1906).

The Ohio and Mississippi Railway Company v. Stein, 140 Ind. 61 (1894).

Priestly v. Fowler, 3 M. & W. 1 (England 1837).

Robertson v. The Chicago and Erie Railroad Company, 146 Ind. 486 (1896).

Southern Indiana Railway Company v. Harrell, 161 Ind. 689 (1903)

The Southern Indiana Railway Company v. Martin, 160 Ind. 280 (1903).

Southern Railway Company et al. v. Howerton, 182 Ind. 208 (1914).

Southern Indiana Railway Company v. Harrell, 161 Ind. 689 (1903).

Southern Railway Company v. Elliott, 170 Ind. 273 (1907).

Taylor v. The Evansville and Terre Haute Railroad Company, 121 Ind. 124 (1889).

The Terre Haute and Indianapolis Railroad Company v. Fowler, Admin., 154 Ind. 682 (1900).

Traction and Terminal Company v. Kinney, by Next Friend, 171 Ind. 612 (1908).

United States v. Carroll Towing Co., 159 F.2d 169 (2d Circ. 1947).

Vandalia Railroad Company v. Parker, 178 Ind. 138 (1912).

The Wabash Railroad Company v. Gretzinger, Admin., 182 Ind. 155 (1914).

VITA

Name: Heather Hutchinson

Date of Birth: December 28, 1970
Place of Birth: Indianapolis, Indiana

Education:

B.A., May 1993	DePauw University
J.D., May 1999, Cum Laude	Indiana University School of Law–Indianapolis

Honors:

Indiana Law Review, Executive Editor of Notes and Topics
Indiana University School of Law—Indianapolis Dean's List
Indiana University School of Law—Indianapolis Dean's Tutorial Society
Careers in History Day Speaker, 2000

Research, Training and Professional Experience:

United States Federal Court History Society, 1997 to present
Frederick Douglass Papers Research Assistant, 1998-1999
Indiana Supreme Court Legal Intern, 1998
Indiana Supreme Court History Intern, 1999-2000
Indiana University Teaching Assistant, 2000-2001

Publications:

"The Managed Care Plan Accountability Act," published in *Indiana Law Review,* Volume 32, No. 4, Spring 1999